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THE LAW AND CUSTOM OF THE CONSTITUTION

BY

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IN THREE VOLUMES

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TABLE OF CONTENTS

PAGE

INTRODUCTION xi

CHAPTER V

THE DOMINIONS AND DEPENDENCIES OF THE CROWN

The description of the King's sovereignty 1

1. The United Kingdom.

England and Wales 2
The union of kingdom and principality 3
Scotland 4
The union of the Crowns 4
The union of the kingdoms 5
Ireland 7
The conquest and government 7
The Irish Parliament: its dependence 8
Its independence in 1782 9
The Union and its terms 12
Irish administration 13
The Home Office 14
The Home Secretary—his history and duties . . . 14
Is the chief means of communication between Crown and subject 16
Countersigns documents under the sign-manual . . . 17
Miscellaneous duties of State 18
Is responsible for maintenance of the peace . . . 19
And so controls elements of possible disorder . . . 19
Naturalization 19
Extradition 21
Police 22
His duties as to administration of criminal law . . . 23
As to Prisons 24
The prerogative of mercy 26
The operation of regulative Statutes 28
Local Government 29
Rural Local Government 30
The Parish 31
The Rural District Council 32
The administrative County 34
The Officers of the County 34
The County Council 36
Its connexion with Central Government 37
The Justices of the Peace 39
Urban Local Government 40
The Municipal Corporation 41

PAGE

The Urban District 41
Relations of County and Urban Government . . . 43
Urban terminology 43
The duties of the Local Government Board 44
As to the Poor Law 45
As to public Health 45
As to general control 48

2. The Adjacent Islands.

The Isle of Man 50
The Channel Islands 51
Jersey 52
The States and their legislative powers 54
Guernsey 56

3. The Colonies.

The Colonial Office and its history 58
Crown Colonies 60
Crown Colonies distinguished from Protectorates . . . 60
Legislation by Order in Council 60
Modes of origin of Protectorates 63
Common features of Crown Colony and Protectorate . . . 64
Forms of Crown Colony government 64
(*a*) Government with no legislature 65
(*b*) Government with nominated legislature . . . 65
(*c*) Colonies with partly elected legislative council . . 66
(*d*) Colonies with representative but not responsible government 67
The Self-governing Colonies 68
Responsible government a gradual growth 69
The Dominion of Canada 72
The Commonwealth of Australia 72
General Principles of Colonial Government 75
The royal veto 75
When the King can legislate by Order in Council . . . 76
When the power ceases 76
Legislation by Parliament 77
The Colonial Governor, his powers 78
In Crown Colonies and Self-governing Colonies . . . 79
His legal liabilities 81

4. India 82
The Emperor of India and the Secretary of State . . . 83
The Secretary of State and the Council of India . . . 84
What must be done *in* Council or *with* Council 86
Parliamentary control over Indian government . . . 86
Government in India 87
The Governor-General in Council, executive or legislative . . 87
The Provinces 89
The Presidencies 89

PAGE

5. **Miscellaneous Possessions.**

Aden, Ascension, Islands 89
Dependent States 90
Protectorates, their various forms 91
Spheres of influence 94
Egypt and the Soudan 95

CHAPTER VI

THE CROWN AND FOREIGN RELATIONS

The Foreign Office 97
Diplomatic agents 98
How appointed 99
Their immunities at home and abroad 99
Consuls 101
The prerogative in making war 102
In making peace and treaties 103
As to cession of territory 104
Foreign jurisdiction 111

CHAPTER VII

THE REVENUES OF THE CROWN AND THEIR EXPENDITURE

1. **The Revenue** 113
Its sources 114
The Customs 115
The mediaeval customs, tunnage and poundage . . . 116
The Tudors and the Book of Rates 117
The consolidation of 1660 117
Modern simplifications 119
The Excise 119
Its origin 120
Uses of the term 121
Establishment licences 122
Estate Duty 122
Stamps 122
For what purposes required 123
Taxes 124
Mediaeval taxation 125
The tenth and fifteenth, and the subsidy 127
The taxation of Charles II 128
The Land-tax 129
Modern taxation of property 130
The Post Office and Telegraph Services 131
Their operation, and productiveness 132
The Crown Lands 133
Their relation to the civil list 135
The Revenues of Scotland and Ireland 135

PAGE

2. Collection and Expenditure of Revenue 136

How collected, issued, and accounted for 137
The History of the Exchequer Offices 138
The Norman Exchequer 139
Its officers and procedure 139
Changes of the sixteenth century 140
The Auditor, Tellers, and Clerk of the Pells . . . 141
The Course of the Exchequer 142
The three stages of Parliamentary control 142
The control of issue, 1688–1834 143
Lord Grenville as Auditor of Receipt 144
Changes, 1688–1866 146
Changes as to Audit 146
As to keeping and presentation of accounts 147
As to mode of issue 148
As to financial year 149
The Exchequer and Audit Act 149
Mode of collection of public money 150
Control of issue of public money 150
The Comptroller and Auditor-General 151
Consolidated Fund Services 151
Supply Services 152
How estimated and granted 153
Consolidated Fund Act and Appropriation Act . . . 154
How issued 155
Account and Audit 156
Finance accounts and Appropriation accounts . . . 156
The Public Accounts Committee 157
Supplementary estimates 158
Treasury Chest and Civil Service Contingencies Funds . 158
Collector's advances 159
The national accounts are cash accounts 160
Changed character of Treasury control 160
Duties of Treasury to king and parliament 160
The payment of the Civil Service 161
The Civil List and the charges upon it 163
The present Civil List 165

CHAPTER VIII

THE ARMED FORCES OF THE CROWN

1. The Army and Navy.

History of the Military Forces 167
The Feudal levy 168
The National levy 168
Armies before the Commonwealth 169
The standing army 171
The three legal obstacles to its existence 171

PAGE

The Composition of the Military Forces 172
Indian and Colonial forces 172
The Regular forces 173
Their numbers, how fixed 173
The Indian troops at Malta, 1878 173
Enlistment, and its terms 175
The officer's commission and its terms 176
The case of Lieutenant Hall 176
The Territorial and Reserve forces 177
The Militia 177
The Special Reserve 179
The Yeomanry and Volunteers 179
Forms of Reserve 180
Organization of the Territorial Force 180
The discipline of the Army 181
Articles of War 181
The Mutiny Acts 182
The Army Act 182
The composition and discipline of the Navy 183
Numbers and terms of enlistment 183
Articles of War and the Naval Discipline Act . . . 185
Persons subject to military law 185
Their liability to the common law 185
Military law and jurisdiction 186
Restraints on the jurisdiction 187
Sutton v. *Johnstone* and *Dawkins* v. *Paulet* 188

2. The War Office and the Admiralty.

The government of the army before 1855 189
The Ordnance Board 191
The Secretary at War 192
The Commander-in-Chief and the Secretary of State . . 194
The Commissariat and the Treasury 196
The Secretary of State and his duties 196
The centralization of 1855 198
The government of the army, 1855–70 198
The threefold division, Military, Ordnance, Finance . . 200
The War Office since 1870 200
The duties of the Secretary of State 200
The division of labour—Order in Council of 1888 . . 202
Order in Council of 1895 203
Abolition of the office of Commander-in-Chief . . . 205
The Army Council 206
The Secretary of State and Parliament 208
The Secretary of State and the Army 210
The Admiralty 211
The composition and duties of the Board 211
Relations of Admiralty and War Office 213
The Imperial Defence Committee 214

CHAPTER IX

THE CROWN AND THE CHURCHES

PAGE

1. Introductory.

The State and religious societies 217
Establishment 218
The National Church before the Reformation 219
The rules of the Conqueror 220
The practical independence of Convocation 221

2. The Reformation Settlement.

Changes, doctrinal, social, constitutional 222
The restraint of Appeals to Rome 223
The appeal to the Crown in Chancery. 223
The submission of the Clergy 224
As affecting the summons of Convocation 225
As affecting the legislative powers of Convocation . . . 227
How a canon is made 228
The sanction of canons 231
The Acts of Uniformity 231
Effect of statutory indorsement of doctrine 232

3. Ecclesiastical places, persons, and property.

Ecclesiastical places: the Province 233
The Diocese, and its subdivisions 233
The peculiar 233
Ecclesiastical persons: the Archbishop 234
The Bishop, the Dean 235
The Archdeacon, the Rural Dean, and the Clergy . . 236
The *status* of Orders 237
Ecclesiastical law and punishments 237
Ecclesiastical property 238
Endowments, Tithe, Queen Anne's Bounty . . . 238
The Ecclesiastical Commission 239

4. The Scotch Church.

Its establishment 241
Its mode of government 241
The General Assembly 242
Its relation to the Crown and to the Courts 242
The Free Church of Scotland and the Courts 243

5. The Church in Ireland, India, the Colonies.

Disestablishment and disendowment 245
The Church in India 247
The Colonial Church 247
The right of the Crown to create ecclesiastical jurisdictions . 248
The necessary assent of the Crown to the consecration of a Bishop 249
The five modes of expressing assent 249

CHAPTER X

THE CROWN AND THE COURTS

PAGE

1. Jurisdictions merged in Supreme Court.

The History of the Courts 252
Civil and criminal jurisdictions 252
The Curia and the Courts of Common Law 253
The Chancery, a department, and a Court 255
Equity and Common Law 256
Wills and matrimonial causes 257
The Admiralty Court 257
The Courts in 1873 257
Courts of first instance 258
The judges of the Courts 259
Courts of intermediate appeal 260
Criminal jurisdictions 261
The Circuit Commissions 261
The Courts of Durham and Lancaster 264

2. The Supreme Court of Judicature.

The fusion of jurisdictions 264
The Divisions of the Supreme Court 265
The High Court and the Court of Criminal Appeal . . . 266
The Court of Appeal 267
The Divisions of the High Court 267
The judges of the Supreme Court 268

3. Courts of inferior jurisdiction.

Civil Courts, local, or Courts of Request 270
The County Courts 270
Criminal Courts: the Commission of the Peace . . . 271
Procedure in criminal cases 272
Connexion of inferior and central jurisdiction 272
The borough magistracy 273
The Recorder, Stipendiary, and Assistant Judge . . . 273

4. Courts outside the Supreme Court.

The Court of the Lord High Steward 274
Courts-Martial 275
Ecclesiastical Courts 275
The Archdeacon's Court 277
The Court of the Bishop 277
His Chancellor and Vicar-General 277
The Church Discipline Act 278
The Clergy Discipline and Public Worship Acts . . . 279
The Courts of the Archbishop 279
The Courts of Scotland 281
The Courts of Ireland 282

PAGE

The Courts of India 283
The Colonial Courts 283

5. The Courts of Final Appeal.

The House of Lords 284
English, Scotch, and Irish Appeals 285
The King in Council 286
History of Appeals to the Council 287
From the Channel Islands, the Plantations, and the Isle of Man 287
In matters of lunacy 288
The Court of Delegates 288
The Judicial Committee 288
Its jurisdiction 288
Limitations on right of appeal 289
The composition of the Courts 291
The Lords of Appeal 292
The members of the Judicial Committee 292
The procedure of the two Courts 293
Points of difference 293

6. The Crown in relation to the Courts.

The creation of new jurisdictions 295
The interference with existing jurisdictions 297
The liabilities of the Crown 298
A Petition of Right 299
Liabilities of the Crown's servants 300
For wrong 300
Excepted cases 301
For failure to discharge duty 302
Distinction between duty to the Crown and to the public . 304

APPENDIX

Commissions and Instructions to Colonial Governors . . 305
Forms relating to issue of public money 316
Letters Patent constituting Army Council 323

INDEX 325

INTRODUCTION

THIS volume completes the survey which I have attempted to make of the departments of Government, their constitution and working, and of the relations of the Crown to the Church and the Courts.

The growth of the Departments.

It is difficult, however, to leave the subject of the departments of Government without saying a few words, of a general character, as to the history of their growth and the almost accidental processes by which they have come to be what they are; and again, as to the methods by which a minister set to control, with no previous experience, the vast and complicated mechanism of one of these departments is supplied with the advice and information necessary to enable him to assume responsibility without disaster.

The history may be summarized briefly.

The King and his Household.

We begin with the King as the executive, surrounded by the great officers of the Household. These officers become, in time, Court functionaries: they yield in importance to a type of official who exists for the transaction of business rather than for the pomp of state. The business to be transacted is of three kinds, financial, judicial, secretarial; the collection of the King's revenue, the maintenance of the King's peace, the communication of the King's pleasure. The Exchequer, the Law Courts, and the Chancery represent the outcome of a gradual specializing of functions not in their origin clearly distinguishable. As time goes on the executive business of the country increases in bulk and becomes more diverse in character. Of this business a great part is transacted by the King's Council or Committees of the Council. From these beginnings we may trace the development of most of our existing depart-

The business official.

ments, and watch their adaptation to the needs of state as they arose. The Great Seal, for the use of which the Chancellor is responsible, remains the most solemn form under which the King's pleasure can be expressed, but besides the Great Seal there are other methods of authenticating the intentions and acts of royalty, the Privy Seal, with its holder, sometimes one of the most important of the King's ministers, and the signets used by the King's Secretaries. The Chancellor remained a great officer of State, and a confidential adviser of the Crown, but he also acquired judicial duties incidental to his position as a member of the King's Council, and as the special exponent and dispenser of the King's grace. The Chancery is primarily an office, as the Chancellor is primarily an official; but the shortcomings of the Common Law made the Chancellor a judge, and we must go back to them to explain the fact that there is a Chancery Division of the High Court of Justice as well as a Crown Office in Chancery.

The communication of the King's pleasure.

The Chancellor.

While the Chancellor still retains in outline the duties which he had come to discharge in the sixteenth century, the Privy Seal is disused, and the Lord Privy Seal holds a sinecure office which may conveniently be employed to give Cabinet rank to a statesman who is needed in the counsels of the Crown and who is unwilling to undertake the work of a department. But the Secretaries have grown in importance, have multiplied in number, and have changed in character. From Tudor times they were members of the King's Council, responsible for the arrangement of its business, and expected to possess a knowledge of affairs, domestic and foreign; but the importance of the office varied with the character of the holder, and great names are infrequent among the Secretaries from the time of Cecil to that of Shrewsbury. So long as the work which is now transacted by departments was assigned to Committees of the Privy Council, a Secretary of State had no control over any one branch of Government business. But under the first two Hanoverian kings the importance of the Privy Council and its committees, already diminish-

The Privy Seal.

The Secretary of State.

ing, tended further to diminish; the Cabinet increased in power, and with it the Secretaries. Their work was still so distributed—into northern and southern departments[1]— that neither had full responsibility for foreign affairs, yet they could take an initiative and use an independence which they had lacked before. The geographical division of their work had, we may presume, very little effect on Bolingbroke when he worked with the Foreign Committee of the Council; and certainly would not have induced William Pitt to pay any regard to the province of diplomatic action assigned to his colleague. Yet, as matters stood before 1782, the work of the Secretaries of State was so arranged as to make friction possible and responsibility uncertain.

Northern and Southern.

The separation of duties effected in 1782, though it did not prevent a collision between ministers who were disposed to quarrel, was of great importance in the history of the departments of Government. Home and Foreign affairs are recognized for the first time as two distinct provinces of administration, and, though in theory the work of all Secretaries of State is interchangeable, from this time forth, as successive Secretaryships have been brought into existence, special functions have been assigned to each. They are recognized as departmental chiefs, not as channels for communicating the intentions of the King in Council.

Home and Foreign.

It is curious that this important change should not be recorded in the minutes of the Privy Council or in the departments themselves. The mode in which it took place appears only in the circular letter sent by Fox to our ministers abroad, in which he informs them that the King has been pleased to make a new arrangement in the departments 'by conferring that for Domestic affairs and the Colonies on the Earl of Shelburne and entrusting

[1] The lines of this distribution of work were laid down by the Stuart kings, though the provinces of each Secretary varied from time to time at the royal pleasure and were not mutually exclusive. In the eighteenth century they had become fixed. I am indebted to the kindness of Professor Firth for references to such a distribution in 1640, and in 1660. Cal. State Papers, Dom., 1629-40, p. 433. Hist. MSS. Comm. iv, Rep. App., p. 230.

me with the sole direction of the department of Foreign Affairs.'

Henceforward when a new Secretary of State was created he was created with a view to the discharge of specific duties, although the duties of all are interchangeable, and the title of the office is 'one of His Majesty's Principal Secretaries of State.' Thus in 1794 a third Secretary was made responsible for the general policy in respect of the army and the conduct of military operations abroad. Then in 1801 the care of the Colonies was entrusted to him. In 1855 the strange miscellany of departments which provided and controlled the army was swept together and formed the new province of the new Secretary of State for War, while the increasing work of the Colonial Office obtained the undivided attention of the Secretary of State for the Colonies. Later, in 1858, the Secretary of State for India stepped into the place of the East India Company.

The modern Secretariat.

Such and so various are the developments of the original machinery for communicating the King's pleasure to those whom it might concern.

Scotland and Ireland.

It seems somewhat of an anomaly that the ministers who are responsible for the domestic affairs of Scotland and Ireland should stop short at the title of Secretary, and that the Irish Secretary should be no more than Secretary to the Lord Lieutenant: but these are not necessarily Cabinet offices: Scotch business was administered for nearly 150 years, before 1885, by the Home Office with the assistance of the Lord Advocate, and it may happen from time to time that the Lord Lieutenant represents Irish affairs in the Cabinet to the exclusion of the Chief Secretary.

The Boards.

Still more anomalous is the statutory constitution of the Boards which, with the Secretariat, make up the bulk of the great administrative departments. The Board of Trade is still, and the Board of Education was until very lately, a Committee of the Privy Council. It is true that these Committees were seldom, if ever, known to meet, but their existence recalls the time when Committees of the Privy

Council transacted much of the business of Government, and it will be found that other Boards, when first constituted, took over some duties heretofore discharged by the Privy Council. But with the exception of the two which spring directly from Committees of Council, the Boards have taken the place of Commissioners appointed to discharge administrative duties, but without a political chief to represent and defend them in Parliament. Thus the Local Government Board in 1871 took the place of the Poor Law Board, which in its turn, in 1847, had assumed the duties of the Poor Law Commissioners, a body appointed in 1834 to administer the Poor Law, with no representative political chief. Duties have been added to those of the old Poor Law Board, largely created by statute, but in some cases transferred from the Home Office or the Privy Council; but the Board, as created by statute, does not discharge them. The Board of Works, in like manner, took over a portion of the duties of the Commissioners of the Woods, Forests, and Land Revenues of the Crown. The work of the Board of Agriculture, though partly transferred from the Privy Council and the Board of Trade, is to a great extent the work previously done by the Land Commissioners, who had in turn absorbed the duties of three earlier Commissions concerned respectively with the commutation of tithe, the enfranchisement of copyhold, and the enclosure of common lands.

Their origin.

Such is the origin of the administrative duties discharged by these Boards. Apart from the President of each Board their composition presents some curious features. The five Secretaries of State are members of every Board, and this may be a reminiscence of the early relations of the King's Secretaries to the Council and its Committees. In other respects their composition varies so much as to suggest that there was some purpose in the selection of members of each Board. On the other hand, it is so obviously unlikely that any of these Boards would ever meet that the choice of their members may have been an exercise of harmless ingenuity on the part of the draftsman. Thus, besides the Secretaries of State, the

Their composition.

First Lord of the Treasury is placed on the Boards of Agriculture, of Education, and of Trade; the Lord President of the Council on the first two of these and on the Local Government Board. The Chancellor of the Duchy and the Secretary for Scotland are on the Board of Agriculture; the Chancellor of the Exchequer on the Local Government Board and the Board of Education. The President of the Board of Trade is placed upon the Board of Works; while the Board of Trade—if it ever met—would be honoured by the presence of the Archbishop of Canterbury and the Speaker of the House of Commons.

Their purpose.

It is certainly very difficult to understand why these Boards have been thus constituted, unless it is to preserve some historical connexion with the Committees of the Privy Council. They cannot exist for the purpose of providing skilled advice for the political heads of departments. One can hardly suppose that the President of the Board of Education would wish to consult the Chancellor of the Exchequer on questions relating to the training of teachers, or that the Secretary of State for India could usefully advise the President of the Board of Agriculture on the subject of a muzzling order for dogs.

The Commissions of Treasury and Admiralty.

Very different from these Boards, and from one another, are the two Boards which now represent two great offices put into commission—the Treasury and the Admiralty. The Treasury Board, though it contains the Chancellor of the Exchequer, has little concern with finance. It is a means of providing a high office, that of First Commissioner of the Treasury, without departmental duties, for the Prime Minister or Leader of the House of Commons, while the junior Lordships give office and emolument to the party Whips. The Admiralty Board has been made the means of supplying expert advice to the civilian chief who is responsible for the well-being of the navy.

The provision of expert advice.

We may well take note here of the modes in which the political chiefs of departments obtain the expert advice which they necessarily require. In almost every case the minister who is invested with the responsibility for the

conduct of some portion of our executive government must find himself charged with the working of a machine whose action he has hitherto contemplated only from the outside. If he has any purpose except to keep the machine going, he is confronted with the difficulty of bringing his ideas as to how the machine ought to work into some correspondence with the facts,—the actual process of its working,—which he is now for the first time beginning to comprehend.

The three Councils.

This must be the case with every department, but the three to which a minister might come least prepared with the information necessary to the conduct of business would seem to be the Admiralty, the War Office, and the India Office. The post of Lord High Admiral has been in commission, with short intervals of revival, for more than 200 years, and the First Lord—the political chief—has been for many years past supplied with the professional advice which he needed by the Naval or Sea Lords. The Secretary of State for War has until recently enjoyed no such assistance. Mr. Cardwell, in the course of his great work of reorganization, complained frequently of his needs in this respect, but while the office of Commander-in-Chief remained in existence it stood in the way of any satisfactory scheme for the supply of professional advice to the Secretary of State. The difficulty was obvious. If the Commander-in-Chief was the sole professional adviser of the Secretary of State, his duties were heavier than one man could discharge: if he was associated, as an adviser, with others of his profession, his position as their military chief made it difficult for those others to advise on an equal footing. Within the last five years the abolition of the office of Commander-in-Chief has made it possible to constitute an Army Council, consisting of distinguished soldiers who represent the great branches of the military profession, and who, with the Financial Secretary as a civilian colleague, are bound to give their best advice to the Secretary of State.

The Admiralty Board.

The Army Council.

But these two Boards, the Commission of the Admiralty and the Army Council, are created, and might at any time be altered, re-constituted, or dissolved, by Letters

Patent[1]; their business, and the duties of their members, might be rearranged by Order in Council, or, to a large extent, by the directions of their political chief.

The Council of India.

Council of India a statutory body.

The Council of India stands in a very different relation to the Secretary of State. It is a statutory body; its duties, its meetings, its procedure, are regulated by the Act of Parliament which transferred the government of India to the Crown. Doubtless Parliament intended to preserve, in some measure, the relations which had existed between the Directors of the East India Company and the President of the Board of Control. Hence every order or communication which is to be sent to India, or to be made in the United Kingdom, must, with limited exceptions, be submitted to the Council for discussion or an opportunity given for its perusal. And yet, although the Council of India occupies a position infinitely stronger in relation to its Parliamentary chief than the Admiralty Board or War Office Council, the position of the Secretary of State as responsible to his colleagues in the Cabinet, and to the nation in Parliament, for action taken, makes his Council little more than a consultative body with whom on certain occasions he is statutably bound to act, but whose conclusions he may always overrule. It is in fact impossible, under our constitutional system, to construct a department of Government in which power is shared between an extra-parliamentary Council and its political chief, who can say for what things he will, or will not, be answerable to Parliament.

Power of political chief.

The Cabinet may decline to be responsible for the proposed action of the minister: then he must give way or retire; but so long as he enjoys the confidence of his colleagues in the Cabinet he can make his will prevail in his Council.

Distinctions between the three Councils.

But in two points there is a great difference between the Council of India and the Boards which advise the heads of the War Office and the Admiralty: firstly, the Secretary of State for India, if he overrules the opinion of his Council,

[1] If the Army Council were dissolved, the Secretary of State would remain to conduct, with his permanent staff, the business of his office. The dissolution of the Board of Admiralty would necessitate the appointment of a Lord High Admiral or the creation of some new method for conducting the affairs of the navy.

must record his reasons for so doing; and, secondly, the members of his Council have a statutory tenure for a term of years, depending, like that of the Judges, on good behaviour. The First Lord, or the Secretary of State for War, might, if he differed from his advisers, insist upon an alteration in the patent as a condition of his retaining office, and might address a recalcitrant member of his Council or Board, *mutatis mutandis*, in the language of Lord North to Fox: 'His Majesty has been pleased to order a new Commission of the Treasury to be made out, in which I do not observe your name.'

The method of providing expert assistance for a political chief and his department by means of a Council has not been followed except in the three departments which I have mentioned. The Consultative Committee of the Board of Education is a body wholly outside the Board. It has a statutory existence, and a statutory duty—that of framing regulations for a register of teachers—subject to the approval of the Board. Beyond this its duties are to consider and report upon such educational questions as the Board may refer to it. The members of the Committee, unlike those of the three Councils which we have been discussing, receive no emolument for their services. It is, in fact, a standing departmental committee, for use if required.

The Consultative Committee.

A department of Government can usually provide or obtain expert advice for the information of those who are concerned in its administration; but when the political chief of the department represents a great profession of which he is not a member, or where his responsibilities cover the vast range of the government of India, it is reasonable and right that he and those who work under him should possess a definitely constituted body of advisers who can supply the special experience needed, and are always available. The counsel thus given does not in any way diminish the responsibility of the minister, nor should it withdraw from the Cabinet questions which ought to be there decided. It is for the minister to determine what matters can be settled within his department, and what should come before the Cabinet. In the three offices which

Councils do not lessen ministerial responsibility.

we have been considering there must always be a class of business which, though not exceptional in importance, demands professional knowledge or special experience for its proper conduct: but questions arising in the Colonial Office or the Foreign Office which are outside the ordinary routine of business would probably be of an Imperial or international character, such as the Secretary of State would desire to bring before the Prime Minister and his colleagues. It is difficult to imagine a permanent Colonial Council which would not to some extent encroach upon the functions and diminish the responsibilities of the Cabinet.

Setting aside then the Admiralty, the War Office, and the India Office where the ordinary machinery of the Civil Service is supplemented by a Board or Council of advisers, the minister responsible for a department of Government must look to his permanent staff for information and advice, or for the suggestion of recourse to outside skilled opinion if such is required.

The Civil Service:

The quality of the assistance thus given to the minister, in other words the excellence of our Civil Service, rests on a threefold security. Our Civil Service is non-political, it is permanent, and it is kept at a high standard of ability and attainment.

is outside party;

The fact that the Civil Service is outside party politics enables the work of the service to be given impartially and freely to successive ministers holding different opinions and aiming at different ideals. It is only thus that the second characteristic of permanence can be assured: no minister could carry on business with a staff of officials some of whom were actively working, speaking, or writing in order to bring about the downfall of the party which he represented. Nor would these political distractions tend to promote efficiency in the service.

is permanent;

It has been pointed out by a recent writer on our constitution [1], that this permanence of office, so necessary to the excellence of the service, rests on custom and not on law, and that it is not the outcome of any exalted

[1] Lowell, Government of England, vol. i, p. 153.

standard of official duty, regarded as a public trust, but is the result of a national regard for vested interests which may seem strange to a citizen of the United States. There is no doubt in this country a feeling that when a man has been encouraged or allowed to spend time, money, and labour in qualifying himself for duties which he is discharging without reproach, he should not be displaced for no other cause than the desire of a party in the State to reward its friends at his expense. This feeling seems to be just in the abstract, and of practical utility as making for the stability of institutions. At any rate we have reason to be grateful to any national tendency or sentiment which has helped to make our Civil Service what it is.

is kept up to a high standard.

But this gratitude would be misplaced if the Service were not maintained at a high standard of ability and attainment. This has been secured by adopting competitive examination as the means of admission to the great majority of appointments in the Civil Service, a practice which has been followed for nearly forty years. In applying this test to the higher branches of the Service care has been taken to make the examination a test of general ability as distinguished from a test of immediate fitness for the technical work of a department, or a mere capacity for accumulating marks, and the result has been to fill our Civil Service with the best product of the Universities. Examination, especially when conducted on a large scale, always runs the risk of becoming mechanical, but it has the advantage of fixing and maintaining a standard. That the highest standard of attainment and efficiency is compatible with freedom from examination is shown at the Board of Education, where appointments are made by a simple process of selection: but examination may, for these purposes, be regarded as a corrective to the natural infirmity of the human judgment, or to occasional lapses from complete impartiality of choice: it has at any rate created a tradition of intellectual distinction as a feature of the Service.

We have seen what skilled assistance is available to a

Expert assistance available for Cabinet.

Minister placed in charge of a department of Government: it remains to ask what means exist for providing the Cabinet itself with the advice which it needs, as distinguished from the counsel which each member of the Cabinet may offer from the resources of his own office.

The Committee of Imperial Defence.

On questions of national security the Government has the advice of the Imperial Defence Committee, an institution which I have described elsewhere, which has grown out of the recommendations of the Hartington Commission of 1890, and which now occupies a permanent place in the Councils of the Crown[1].

The Parliamentary draftsmen.

For the *technique* of legislation the Parliamentary Counsel may be regarded as the advisers of the Government as a whole, as well as of the department specially interested in the contemplated measures. The policy which prompts and underlies any important legislation must be settled by the Cabinet, but the form in which that policy is to be shaped must be the work of the skilled draftsman, familiar with the Statute book, who knows the form in which the intentions of the Government may be most aptly and precisely expressed. It is not easy to say how far those intentions may not be modified when put into the definite phrasing of a Bill and shown in relation to other parts of the Statute book bearing on the same topics. The skill and knowledge of the draftsman may be brought to bear with startling effect on vague or ill-digested projects for legislation, and may influence not merely the form but the substance of the measures which he has to handle.

The Law Officers.

For legal advice on important issues there are the Law Officers of the Crown.

A Ministry of Justice: its component parts.

It has been observed by writers on our constitution that we have no Minister of Justice, and it is true that the functions of such a department are scattered among our institutions. The Home Secretary is generally responsible for the maintenance of order, for the exercise of the prerogative of mercy, and for the appointment of

[1] See infra, pp. 214-17, and Part i, p. 136.

Stipendiary and Police Magistrates and of Recorders. The Lord Chancellor nominates the Judges of the High Court, and appoints and can remove County Court Judges and Justices of the Peace. The Attorney-General regulates the conditions under which prosecutions should be undertaken by the Government and the action of the Public Prosecutor, and appears, with the Solicitor-General, in cases in which the interests of the Crown are concerned and in criminal trials of great importance. These duties of a Minister of Justice are, as it were, in Commission, and there is another, which falls upon the Law Officers of the Crown, namely, to advise the departments of Government, or the Government as a whole, on the legal aspect of political questions.

The advice of the Law Officers.

Every department has a legal adviser of its own, but is entitled to consult the Law Officers if it should require to do so. In many departments their opinion may only be required to interpret Statutes which it is the business of the department to administer, and then only in matters of great complexity or of a highly controversial character. But I am dealing here with matters which could not be settled without reference to the Cabinet, in which legal and political difficulties are intermingled, even to the extent of involving issues of peace and war: and here the advice of the Law Officers may determine the action of the Government. Such are questions which affect international relations, our relations with protected territories, and with foreign nations and the subjects of foreign powers in respect of such territories, or which concern the royal prerogative in the creation of jurisdiction or the cession of territory. On questions of such a character there must be a mass of recorded opinion, available to any Government, though not to the public[1]. These opinions are not available to the public partly because they may touch upon delicate international questions

[1] A collection of these opinions, on constitutional questions, was published by the late Mr. Forsyth in 1869. It is not likely that any similar publication, however interesting, would now be sanctioned or facilitated by the Departments of Government.

which remain still unsettled; but partly also because, in respect of them, the Law Officers stand to a department or to the Government as the permanent staff of a department to its political chief. The Minister or the Government takes, and must take, the whole responsibility for action; and this action must be justified or condemned by its results. It may be the misfortune of the Minister that he was offered bad advice, and took it, but he cannot defend himself by shifting the blame on to his departmental advisers. The loyal service of the permanent staff demands in its turn complete assumption of responsibility by the political chief.

I have endeavoured in these pages to sketch the character of the great departments of Government, and of the sources upon which their political chiefs or the Cabinet as a whole can rely for information and advice, because it is often difficult to understand how party government—which necessarily means to a great extent government by amateurs—is compatible with efficient government. The efficiency depends on the excellence of the Civil Service, and on the public spirit of that service and of all those who in any capacity are called on to assist the Ministers of the Crown. But this is not very easy of explanation. An eminent Civil Servant once said to me when trying to make me understand the working of his department, 'These things are like tennis; you cannot understand the rules until you have played the game.' I appreciated at the time the profound truth of the remark: and I have since realized that it is possible to have played the game and yet to find it difficult to make the rules intelligible.

CHAPTER V

THE DOMINIONS AND DEPENDENCIES OF THE CROWN

This chapter must cover a wide field. In official documents the King is described as—

> Edward, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King. Defender of the Faith. Emperor of India[1].

And yet these words hardly describe the compass of his sovereignty. In this chapter I wish to deal with the relations of the central executive to all those territories which acknowledge the rule of the King, whether or no they fall under the title which I have just set forth.

Thus I must speak of the United Kingdom and its component parts, of the Home Office as the central executive for domestic affairs, and of the Local Government Board as connecting the forms and areas of local self-government with the central power. The United Kingdom.

Next I must note the constitutions of the adjacent islands, and the mode in which, mainly through the Home Office, they are connected with the executive government of the country. The adjacent islands.

Thirdly will fall to be considered the royal prerogative in its relation to the Colonies, the mode of its expression through the Colonial Office, and the limitations imposed upon its exercise by the constitutions of the various Colonies. The Colonies.

Fourthly will come the India Office, its relation to the Government of India, and the independent native States. India.

Lastly, I must note some miscellaneous possessions of the Crown, and the spheres of influence which bring us to the borderland of our foreign relations. Miscellaneous possessions.

[1] For the royal titles see 39 Vict. c. 10, and 1 Ed. VII, c. 15.

Section I

The United Kingdom

§ 1. *England and Wales.*

England and Wales have been one kingdom for so long a time that to consider the process of union between the two seems almost as remote as an inquiry into the welding together of Saxon England under pressure of Danish invasion and Norman rule. But some trace of this gradual assimilation of institutions is still comparatively modern and needs a few words of explanation.

Edward I and Wales.

Edward I annexed the territories taken from Llewellyn. He announced this in the Statutum Walliae (1284), which introduced the shire organization into these territories and also into his own domains in Wales. Out of the first he constituted Anglesey, Carnarvonshire, and Merionethshire; out of the second, Flintshire, Cardiganshire, and Carmarthenshire. With the exception of Anglesey, these shires did not correspond in area with the modern counties of the same name. Flint was cut out of the county palatine of Chester, which, together with the lordships of Carmarthen and Cardigan, had been granted to Edward by his father in his lifetime. Provision was made for the administration of royal justice over these shires, but they were not subject to the Courts at Westminster.

The Marcher Lords.

Outside of these territories, and on the south, lay the county palatine of Pembroke, and the lordship of Glamorgan, both organized on the shire system, but having those *jura regalia* which constituted them palatinates. On the east, right up to and including some parts of Gloucester, Hereford, and Shropshire, lay the marcher lordships. These lordships, the outcome of conquest from the Welsh by English lords and knights, though nominally held by the King, enjoyed a large measure of independence. They played a considerable part in the mediaeval history of England[1], and from the extent of their jurisdictions were able to subject the dwellers on the land to considerable

[1] Tout, Historical Essays by members of Owens College, p. 79.

hardships. This evil was dealt with 200 years later by the establishment of the Court of the 'President and Council of Wales and the Marches' with a jurisdiction corresponding in some measure to that of the Star Chamber.

This Court, which exercised a useful and needed severity in the fifteenth and beginning of the sixteenth century, was confirmed in its jurisdiction by Henry VIII[1], survived the Star Chamber and the Commonwealth, and indeed the necessity for its existence, and was abolished by 1 Will. & Mary, sec. i. c. 2.

Henry VIII and Wales.

But Henry VIII recognized that the evils arising from the lawlessness of the border needed other remedies than these. It was necessary to bring the marcher lordships into the shire system common to the rest of England. By this time Pembroke and Glamorgan had come to be regarded as shires, with the shire organization, and are styled, together with those constituted by the Statutum Walliae, as 'shires of long and ancient time.'

In 1535 the marcher lordships were grouped into five new counties or added to existing counties. Thus were constituted Monmouth, Brecon, Radnor, Montgomery, and Denbigh. Monmouth was treated as a part of England in so far as it was brought under the jurisdiction of the Courts at Westminster, and was thenceforth to be represented by two knights of the shire for the county and one burgess for the borough of Monmouth.

The twelve counties.

The twelve counties which now constituted Wales were ordained 'to stand and continue for ever from henceforth incorporated, united, and annexed to and with this realm of England[2].' Each county was to be represented by a single knight of the shire, and one burgess was to represent the shire town of each county except Merioneth. The rules of English law were to prevail, except in the case of such Welsh customs as the King in Council might approve[3].

A later Act[4] made fuller provision for the administra-

[1] 34 & 35 Hen. VIII, c. 26. [2] 27 Hen. VIII, c. 26, s. 1.

[3] For an account of the introduction of the shire system into Wales see Tout, 'The Welsh Shires,' Y Cymmrodor, ix. 201.

[4] 34 & 35 Hen. VIII, c. 26.

The Courts.

tion of justice. Four circuits were formed, covering the whole area of the Principality, and four justices were to sit, with the Royal Commission, twice a year in each county, exercising a jurisdiction as large as that of the King's Bench and Common Pleas at Westminster.

The organization of justice was provided for on the lines of an English county; but the Courts above referred to, called the King's Great Sessions, and the Court of the President and Council of Wales and the Marches, were outside and independent of the jurisdiction of the Westminster Courts[1].

These Courts, except that of the President and Council, which was abolished in 1688, transacted the judicial business of Wales, with some modifications of procedure, until 1830[2], when they were abolished, and the Principality came under the jurisdiction of the Courts of Westminster.

In 1747 it was enacted that the mention of England in an Act of Parliament should be taken to include Wales[3].

§ 2. *Scotland.*

The union of the Crowns.

The relations of Scotland with England are settled by the Act of Union, the provisions of which have been but slightly affected by subsequent legislation. Such a union was inevitable from the time that the two kingdoms were placed in the same allegiance by the accession of James VI of Scotland to the throne. Very early in the reign of James it was held that Scotchmen born after James had become King of England were entitled to the rights and privileges of English subjects, being born in allegiance to the English King. The Crown of Scotland followed throughout the seventeenth century the vicissitudes of the English Crown. The Scotch Parliament in 1661 declared the hereditary right of Charles II, and in 1689 followed the English Bill of rights with the Scotch claim of right,

[1] 34 & 35 Hen. VIII, c. 26, modified by 18 Eliz., c. 8, and 13 Geo. III, c. 51.

[2] For an account of these Courts and their abolition see Rhys and Brynmor Jones, The Welsh People, pp. 386–92.

[3] 20 Geo. II, c. 42, § 3.

and the offer of the Scotch Crown to the King and Queen of England[1]. As the inconvenience of separate Parliaments and the risks of a divided succession made it plain that union was inevitable, each Parliament tried to force the hand of the other. The Scotch in 1704 passed the Act of Security providing that, unless on the death of Anne there were heirs of her body, or a successor was appointed by her in conjunction with the Estates, then in such case the Estates should appoint a successor. The person so appointed was not to be successor to the throne of England unless meantime provision was made for the independence of Scotland and its freedom from English influence[2].

The union of the nations.

The English Parliament retorted next year by an Act which made Scotchmen aliens and prohibited the importation of Scotch cattle, coals, or linen after Christmas Day, 1705.

The Scotch had most to lose by holding out, and before this last Act could take effect the terms of union were so far settled that the English Parliament repealed the threatening clauses.

The United Kingdom of Great Britain was the creation of the Treaty of Union.

From 1602 until 1707 England and Scotland had been two communities in allegiance to a King who held his Crown by two distinct titles, governed through two distinct executive bodies, and taxed and legislated through two distinct Parliaments. In 1707 the Act of Union was passed[3]. Its main provisions secured that England and Scotland should be one kingdom, and the succession to the Crown the same for both countries, that they should have one Parliament, and that except as otherwise agreed the rights of citizenship should be the same for all.

Terms of union.

The representation and taxation of the two countries

[1] Acts of the Parliament of Scotland, ix. 38.

[2] Acts of the Parliament of Scotland, xi. 136. The royal assent had been refused to this Bill in 1703.

[3] 6 Anne, c. 11. The Acts of Ratification passed in Scotland on the 16th of January, in England on the 6th of March, 1707.

was settled in proportion to their respective numbers and wealth; the ecclesiastical arrangements of the two countries were carefully maintained as then existing. Scotland moreover retained her rules of private law and the constitution and procedure of her Courts. The judgments of the Court of Teinds and the Court of Session[1] from which appeal had lain to the Parliament of Scotland were held, though this was not expressly stated in 6 Anne, c. 11, to be subject to appeal to the House of Lords. A new Court of Exchequer was constituted in Scotland for revenue purposes by 6 Anne, c. 53; from this too error lay to the House of Lords.

As to Private Law.

It remains to consider the relations of Scotland since the Union to the legislative, executive, and judicial machinery of the constitution. The representation of Scotland in the Parliament of the United Kingdom is a matter which I have dealt with elsewhere[2]. Like the rest of the United Kingdom, Scotland is not merely subject, in common with the whole Empire, to the sovereignty of Parliament, but Acts of Parliament are of force in Scotland unless their operation is limited by express words or necessary implication. The attempt made in the Acts of Union with Scotland and Ireland to frame fundamental laws which no subsequent Parliament might alter is noticed elsewhere[3].

Representation.

The Executive Government of Scotland was for some years after the Union conducted by a Secretary of State for Scotland[4]. This office was not continuously filled, but existed, except at short intervals, until 1746. On the rearrangement of the business of the Secretariat in 1782, the Home Office took over the formal conduct of Scotch affairs, the Home Secretary being advised in these matters

The Executive.

[1] The Court of Session is the supreme civil Court of Scotland. The Court of Teinds was a body of Commissioners, since absorbed into the Court of Session, for dealing with ecclesiastical endowment by way of tithe, readjusting its distribution in the interests of the Church, making new parishes, or altering the boundaries of existing parishes.

[2] Vol. i, Parliament, ch. v. s. i.

[3] Ibid., ch. iii.

[4] Stanhope, Hist. of England, ii. 69. For a list of such Secretaries see Haydn, Book of Dignities, 502 (ed. 2).

by the Lord Advocate, a law officer corresponding to the English Attorney-General but discharging for the purpose of the domestic business of Scotland the duties of an Under-Secretary for the Home Department. In 1885 a separate department was created for the conduct of Scotch business, and a Secretary for Scotland appointed who is not a Secretary of State nor necessarily a member of the Cabinet. Almost all the business which was before transacted in the Home Office, through the Secretary of State advised by the Lord Advocate, is now assigned to the new department [1].

In judicial matters Scotland retains her own law, her own Courts with their procedure. The jurisdiction of the House of Lords, in appeal from the Courts of Teinds and of Session, which rested on analogy with the practice before the Union, is now based on the Appellate Jurisdiction Act, 1876. The Courts.

§ 3. *Ireland.*

It is necessary to be brief in noticing the relations of England, or later of Great Britain, to Ireland before the Act of Union in 1801.

Henry II and John endeavoured, so far as their conquest and settlement of Ireland allowed, to impart the English law and judicial organization to their Irish subjects. Irish Parliaments came into existence early in the fourteenth century, summoned in the same form as English Parliaments by the deputy of the English Crown. In 1495 was passed, by one of these, the celebrated Statute called after the deputy of the time 'Poyning's Law [2].' In two important points it altered the relations of Ireland to the English Crown. It brought into force in Ireland all English statutes existing at the date of its enactment. It limited the meetings and the legislative powers of the Irish Parliament. Henceforth the Parliament met only when the King's deputy or lieutenant certified the causes Conquest and settlement. Poyning's Law.

[1] See vol. ii, part i, p. 170.

[2] 10 Henry VII, c. 4, s. 10; see Irish Statutes, Revised Edition, Appendix, p. 761.

of summons under the Great Seal of Ireland and obtained licence for holding a Parliament; while the legislative powers of Parliaments so summoned were limited to the acceptance or rejection of bills already approved by the Crown in Council.

The relations of the Irish Parliament to the Crown, thus established by Poyning's Act, were, in the reign of Mary [1], further explained: after the Irish Parliament had been summoned, other proposed enactments might be certified by the Lord Lieutenant and approved by the Crown in Council: the Parliament might then 'pass and agree upon such Acts and no other.' With these limited powers it occasionally showed signs of independence, as by the rejection of a money Bill in 1692, and it acquired a modified power of initiation by the practice of submitting to the Irish Privy Council the heads of Bills which it desired to see passed: these were sent, or not sent, to the King at the option of the Privy Council; and if returned were submitted to the Irish Parliament in the form approved by the Crown in Council, to be accepted or rejected without amendment. Thus the Parliament obtained a power of suggesting legislation somewhat similar to that of the mediaeval English Parliament, and when, after the Revolution, the hereditary revenues of Ireland no longer met the expenses of government, the Irish Parliament was of necessity more frequently summoned, and its importance proportionately increased.

The Irish Parliament controlled by the Crown in Council.

So far the restraints upon the Irish Parliament had come from the prerogative of the Crown. From the time of the Revolution its legislative independence was threatened by the claims put forward by the English Parliament. In 1720 an Act was passed [2] declaring the powers of the Crown in Parliament to make laws to bind the people and kingdom of Ireland, and the same Act denied the appellate jurisdiction which the Irish House of Lords had exercised, and asserted it for the English House of Lords.

And by the Legislative supremacy of the British Parliament.

The duration of Irish Parliaments, which had been limited

[1] 3 & 4 P. & M. c. 4; see Irish Statutes, Revised Ed., Appendix, p. 776.

[2] 6 George I, c. 5; and see Lecky, Hist. of England in the Eighteenth Century, vol. ii, p. 225.

only by the prerogative of dissolution or demise of the Crown, was by the Octennial Act in 1768 fixed at eight years, unless either of the two causes above mentioned should operate to bring about a speedier dissolution. An increased freedom of action in dealing with money Bills was only one of many signs of impatience at the legislative subordination of Ireland to England. A perpetual Mutiny Act, passed at the instance of the English ministers, helped to bring to maturity the demand for the independence of the Irish Parliament.

Legislative independence granted in 1782.

In 1782 this independence was obtained. The British Parliament passed Resolutions one of which pronounced in favour of the repeal of the Declaratory Act; while another was to the effect that an address should be presented to the King asking him to take such measures as would place the connexion of the two kingdoms on a basis of mutual consent. In pursuance of these resolutions the Declaratory Act was repealed[1]; the right to legislate for Ireland as well as the right asserted for the House of Lords as a Court of error and appeal from the Irish Courts was thereby renounced. The King gave his assent to various Irish Bills repealing the perpetual Mutiny Act, and removing the executive restrictions upon Irish legislation. Henceforth the royal veto was to be the only restraint on the action of the Irish, as on the British Parliament. In the following year, for the more complete assurance of the Irish in their new rights, the British Parliament passed an Act of Renunciation[2], by which the legislative and judicial independence of the Irish Parliament and the Irish Courts was recognized so fully and explicitly as to satisfy every demand which Ireland had made on the subject.

Its working.

It is important to understand the working of the constitution under this phase of the relations between Great Britain and Ireland. The King of Great Britain was the King of Ireland. He was represented in Ireland by a Lord Lieutenant who, like the representative of the Crown in a self-governing colony, chose the Irish Executive. But although the Irish Parliament enjoyed a legislative inde-

[1] 22 Geo. III, c. 53. [2] 23 Geo. III, c. 28.

The Irish Government.

pendence nominally larger than that of the self-governing colonies of to-day, Ireland had not their measure of self-government. The royal veto was a reality, and the responsibility of ministers to Parliament was not recognized. Great offices in the Irish Government had long been treated as sinecures which formed part of the patronage of the First Lord of the Treasury in England: it was not until 1793 that a Treasury Board responsible to the Irish Parliament was even contemplated[1]; nor was there any recognized impropriety in the tenure of high office by a vehement opponent of an important Government measure[2].

The fact was that the Irish Executive represented English party politics. In the language of Mr. Lecky, 'Ministerial power was mainly in the hands of the Lord Lieutenant and his Chief Secretary, and this latter functionary led the House of Commons, introduced, for the most part, Government business, and filled in Ireland a position at least as important as that of a Prime Minister in England[3].'

The Irish Parliament.

The Irish House of Commons was, really, less representative of the Irish people than was the English House of Commons of the English people before 1832. No great desire was expressed for a responsible executive. When Lord Fitzwilliam carried out the official changes and dismissals which led to his recall in 1794, these changes were not made in consequence of votes given or representations made by the Irish House of Commons. They were regarded as indicating a change of policy on the part of the English Government.

The Irish Executive and

The Chief Secretary to the Lord Lieutenant, who sat in the Irish House of Commons and introduced Government business, was, like the Viceroy, representative of the party in power in England. If the Irish Parliament had been really representative, and had insisted upon the responsibility of the executive, the situation might easily have

[1] Lecky, History of England in the Eighteenth Century, vi. 565.
[2] Ibid., vi. 599.
[3] Ibid., vi. 318.

become impossible, because it would be difficult to suppose that the balance of parties and the currents of political opinion would have worked in correspondence in the two countries. English party politics.

The governor of a self-governing colony is a neutral person, a constitutional king: the Viceroy and Chief Secretary alike were members, and practically nominees, of the party in power in England. Thus it might have happened that the Viceroy who was charged with the selection of ministers in Ireland, and the Chief Secretary who was charged with the conduct of Government business for Ireland, might be summoned away from their duties by a change in the balance of English parties. Those who took their place would certainly be of different political prepossessions.

And this dependence of the Viceroy and his Secretary on English party politics did not affect merely the choice of the executive. The royal veto on Irish Bills was a reality, not, as in England, a thing of the past. It would be exercised on the advice of the Viceroy, and one may reasonably suppose that the advice of two successive Viceroys of wholly different political views might be widely divergent on the merits of the same topic of legislation.

Again, the enemies of the King of Great Britain would be the enemies of the King of Ireland, but the foreign policy of the King of the two countries, the declaration of war or the maintenance of peace, would certainly be determined by the advice of his British ministers. The views of his Irish Executive would reach him, if at all, through the Viceroy, himself a member of the British ministry; the views of the British ministers would carry all the weight that would be due to the comparative importance of Great Britain and Ireland; they would be communicated directly, while the opinions of the Irish Executive would pass through an intermediary, perhaps unfriendly to their tenor. So the foreign policy of Ireland would be shaped by the British ministry whether the Irish would or no. But although a declaration of war Possible difficulties.

by the King of the two countries might bring Ireland into hostilities with a power against whom she had no ill will, the Irish Parliament could effectively cripple the military operations of England, by refusing to vote money and men, or by requiring of its executive a policy adverse to that of its neighbour. A collision between the Irish Executive responsible to the Irish Parliament, and the Viceroy and Chief Secretary responsible to the English Parliament, would under such circumstances have been inevitable.

The relations between the two countries could, in truth, only work well by the exercise of great public spirit and mutual forbearance on both sides, or by the existence of indifference or corruption on one. Fortunately for the well-being of the two countries there was no change in the English ministry during seventeen years out of the nineteen that Ireland enjoyed this practical independence of the English Government.

Ireland and Scotland before the Unions.

The relation of Ireland to Great Britain at the time of the Act of Union presented some such difficulties as did the relation of England to Scotland at the commencement of the eighteenth century. Ireland and Great Britain were two independent countries under the same King, but the difficulties in the case of Ireland were greater than in that of Scotland, because the supreme executive in Ireland was dependent on the action of party government in England, and because differences of race and religion caused a risk of disturbance in the smaller kingdom which might necessitate the use of force by the larger kingdom.

It is enough, however, to try and exhibit the working of the two constitutions. I do not wish to pronounce on the merits or demerits of the scheme of 1782–3, or of the policy and procedure of Pitt in bringing about the Act of Union in 1801.

The Union,

The terms of this Union, embodied in Acts of the two Parliaments[1], provided that the succession to the Crown should be the same, and that there should be one Parlia-

[1] 39 & 40 Geo. III, c. 67, and Irish Statutes, Revised Ed., 40 Geo. III, c. 38.

ment for the two countries. The amount of Irish representation in the Lords and Commons was determined: the subjects of the two countries were to possess equal rights as to trade, navigation, and treaties with foreign powers. The Irish laws and Irish Courts were unaffected by the change, except that from the Irish Courts an appeal lay henceforth to the House of Lords of the United Kingdom.

Legislative.

The relations of Ireland to the Parliament of the United Kingdom as regards representation have been elsewhere described [1]; as regards subordination it may be said that Ireland is bound by a public statute unless expressly or by natural implication excepted.

Executive.

Its relations to the executive are neither so simple nor so satisfactory. The King is represented in Ireland by a Viceroy or Lord Lieutenant, who is the chief of the executive; in formal matters the pleasure of the Crown is signified to him through the Secretary of State for the Home Department.

Irish administration.

The Lord Lieutenant represents the Crown, but the Chief Secretary is the minister mainly responsible to Parliament for the conduct of Irish administration. This office is one of increasing importance, since the holder is in everything but name and rank a Secretary of State for Ireland. The administration of public business in Ireland is conducted by a number of Boards, of which comparatively few are under the full and direct control of the Irish Government of the day [2]. Nevertheless, the Chief Secretary may be called to explain or justify the action of these Boards, if questioned in Parliament. The Lord Lieutenant has large prerogatives, and his immunity from action in the Courts of the country for any act done in his official capacity is larger than that of a Colonial Governor [3].

[1] Vol. i, Parliament, pp. 121, 122, 181, 210.

[2] For a description of these Boards see the speech of Mr. Birrell on May 7, 1907, in introducing the Irish Council Bill. Hansard, 4th Series, vol. clxxiv, p. 83.

[3] The legal immunities of the Lord Lieutenant will be treated elsewhere. It is enough here to refer to the case of *Sullivan* v. *Spencer* [6 Irish Reports, C. L. 176], and to invite comparison between that case and *Musgrave* v. *Pulido*. 6 App. Ca. 102.

But the reality of power tends to pass to the man who is responsible to the House of Commons for the exercise of these prerogatives, and the office of Lord Lieutenant, with its costly and dignified surroundings, becomes more and more a survival of a time when Ireland was not as near to us in point of communication, nor as closely connected in point of constitution, as it is at the present day.

The Irish Courts are constituted on the model of the English Courts, and administer the English municipal law.

Central government in England.

So far we have been concerned with the relations to one another of the different parts of the United Kingdom. Before passing to the relations of the central government with the adjacent islands, with India and the Colonies, we must consider the departments which are mainly responsible for order and good government at home. These are the Home Office and the Local Government Board.

The Home Secretary may be said to be mainly responsible for the communication of the King's pleasure in matters arising within the United Kingdom and the adjacent islands, and for the maintenance of internal peace, order, and well-being within those limits.

The Local Government Board is mainly responsible for the grant of powers of self-government and the control of their exercise in various matters concerning public health, public convenience, and the administration of relief to the poor.

§ 4. *The Home Office.*

The Home Office: its history;

When, in 1782, the old division of duties among the Secretaries of State was discontinued[1], and the Colonial Secretaryship was abolished, much of the work of the Southern Department and all the work of the Colonies was transferred to the Home Office. Between 1782 and 1794 the Home Secretary transacted all the business of a Secretary of State which was not concerned with our foreign relations, and this business included, besides the superintendence of our Colonies, all communications between the

[1] See The Crown, part i, p. 165.

Home Government and the Irish—and these between 1782 and the Union were frequent and important—all communications with the War Departments relating to the movements of troops at home and abroad.

In 1794 the Home Office was relieved of much business connected with the War Departments, and of colonial business in 1801; the Act of Union with Ireland brought the Chief Secretary to the Lord Lieutenant into closer communication with the Cabinet, and through his office in London is transacted all Irish business, except some matters of a formal character which still pass through the Home Office.

It would seem as though a department which had been relieved of so much work must now be lightly burdened; such was the impression of the Whig economists when the close of the Napoleonic wars reduced the work of the War Department, when the Act of Union had lightened the labours of the Home Office, and when our Colonies were still few and small[1].

its duties.

But though the Home Office may not have been an exacting department in 1816, the State has been very active in the last ninety years, and much of this activity has been exercised at the expense of the Home Office. The statutes which throw duties on the Home Secretary in respect of the good order, security, and general well-being of the community would, if I were to set them forth, appal the reader as much as Glanvil was appalled by the *confusa multitudo* of the customary rules of law in the twelfth century.

The Home Secretary.

The Interpretation of Terms Act, 1889, enacts that in every Statute the expression 'Secretary of State' shall mean one of 'His Majesty's Principal Secretaries of State for the time being'; and we are thereby reminded that there is no duty of any one Secretary of State which, unless Parliament enacts otherwise, may not be discharged by any other Secretary of State. Nevertheless, the functions of the departments are practically quite distinct, nor would any one suppose that the Home Secretary was the

[1] Hansard, 1st series, vol. xxxiii, p. 893, debate on Mr. Tierney's motion respecting the offices of secretaries of state, April 3, 1816.

Secretary of State referred to in a Military Lands Act, or that the Secretary of State for India was the officer on whom powers were conferred by a Factory Act.

He is the Secretary of State *par excellence.*

But, in addition to the statutory duties imposed on him, the Home Secretary has customary duties as being in an especial manner His Majesty's principal Secretary of State, and these duties have a certain historical interest.

Division of business.

The business of the Home Office is, for the purposes of the department, arranged in three divisions, each superintended by a principal clerk; these divisions are respectively called the Criminal, the Domestic, and the Industrial and Parliamentary[1]. The last two admit of being grouped together, but I think that the convenience of the reader may be better suited by a different arrangement. So I will divide the duties of the Secretary of State as follows:—

(*a*) Communications passing between Crown and subject; or, one may say, the expression of the King's pleasure.

(*b*) Enforcement of public order; or, one may say, the maintenance of the King's peace.

(*c*) Enforcement of rules made for the internal well-being of the community.

(*a*) *Communications between Crown and Subject.*

The Home Secretary:

Whenever the King's pleasure has to be taken, or communicated to an individual or a department, unless the matter is specially appropriate to Foreign, Colonial, Military, or Indian affairs, the Home Secretary is the proper medium of communication. Although each of the Secretaries is capable in law of discharging any one of the functions of the other, yet the Home Secretary is the first in precedence, and his duties bring him into a more immediate and personal relation to the Crown than do those of his colleagues.

communicates King's pleasure;

He is the successor and representative of the King's Secretary as that officer appears to us in the sixteenth century, the Minister through whom the King was addressed, who

[1] There are, besides the permanent Under-Secretary of State, three permanent Assistant Under-Secretaries, one of whom is described as the 'legal assistant' and superintends the criminal business of the Office.

kept the signet and the seal used for the King's private letters, and authenticated the sign manual by his signature. Therefore the Home Secretary has, besides the general duties of his department, much to do that is formal and ceremonial in its character. He notifies to certain great local officials[1] certain matters of State intelligence, such as declarations of war, treaties of peace, births and deaths in the royal family. When the King takes part in a ceremonial he ascertains the royal pleasure as to arrangements, is responsible for their conduct, and must be present.

and State intelligence.

He receives addresses and petitions which are addressed to the King in person, as distinct from the King in Council, he arranges for their reception, their answer, or their reference by the King's command to the department to which they relate; but whether it be a private individual that addresses the Sovereign, or a great corporation such as the City of London, or the University of Oxford, or whether it be one or both of the Houses of Parliament, the matter passes through the hands of the Home Secretary. Besides these miscellaneous duties, in the great majority of cases in which the King's pleasure has to be expressed formally under the sign manual, it is the duty of the Home Secretary to cause the document to be prepared for the royal signature, and afterwards to countersign it. Such documents are sometimes complete, for the purpose which they have to serve, when the royal signature has been affixed and countersigned; in other cases they only authorize the preparation of documents which must pass under the Great Seal.

Countersignature of sign manual.

Where a sign manual warrant is an authority for affixing the Great Seal, it must be countersigned either by the Chancellor, one of the Secretaries of State, or two Lords Commissioners of the Treasury, and this duty of countersignature falls most often upon the Home Secretary. Thus in the creation of a Peer the Prime Minister informs the

Illustrations.

[1] The Lord Mayor of London, the Lord Lieutenant of Ireland, the Lieutenant-Governors of Guernsey, Jersey, and the Isle of Man, the Lord President of the Court of Session, the Lord Justice Clerk, the Lord Advocate for Scotland.

Home Secretary of the intention of the Crown; a warrant for the sign manual is prepared and submitted by the Home Secretary to the King, and having been countersigned by him is returned to the Crown Office as authority for the preparation of the letters patent by which the Peerage is conferred, and the affixing to them of the Great Seal. These are then sent through the Home Office to the newly-created Peer.

I have in an earlier chapter adverted to the distinction between documents which have to pass under the Great Seal and those which are completed by the sign manual countersigned by a Secretary of State. It is enough here to note the vast amount of work of this nature, some purely ministerial, some discretionary in its character, which passes through the Home Office. And further, it should be borne in mind that there is a reason for casting all this work upon the Home Secretary. The reason is that the King's authority is required for a great number of warrants and letters patent, making appointments, conferring honours, issuing orders, or granting licences and dispensations; that the proper channel through which this authority is communicated is one of His Majesty's Principal Secretaries of State, and that since the greater number of these matters are not appropriate to the other departments of the Secretariat—Foreign or Colonial, Indian or Military—the Secretary of State for the Home Department is the obvious inheritor of the ancient duties of the King's Secretary [1].

Reasons for his miscellaneous duties.

For this reason the Home Secretary, among his miscellaneous duties, is the means of communication between the King and the Church [2], for the purpose of making appoint-

Duty of Home Secretary in Church matters.

[1] The form in which the Secretary of State addresses the Sovereign in communicating these matters runs thus:—

Mr. Secretary —— presents his humble duty to your Majesty, and in transmitting the accompanying documents for your Majesty's signature humbly begs leave to explain, &c.

[2] If the Home Secretary should not be a member of the Church of England these duties are discharged by the First Lord of the Treasury. See speech of Mr. Secretary Matthews. Hansard, cccxlix, p. 1734.

ments to benefices vested in the Crown, for setting in motion the Houses of Convocation, and confining their legislative action within certain limits; in matters of administration he advises the King, and communicates his pleasure to the Lieutenant-Governors of the Channel Islands and the Isle of Man.

As to the adjacent Islands.

In the peculiar form of action by which the subject may sue the Crown, or, what is the same thing, a department of government, the right to sue is technically dependent on the King's grace. The cause of action is stated in a petition which is lodged with the Home Secretary, who takes the opinion of the Attorney-General, and consults any department of State that may be affected by the claim. If the opinion of the Attorney-General is favourable, the petition is submitted for royal endorsement of the fiat 'let right be done'; the petition is then sent to the department concerned, that a plea or answer may be returned in twenty-eight days, and the subsequent proceedings follow the course of an ordinary civil action.

As to petitions of Right.

(*b*) *The maintenance of the King's peace.*

The Home Secretary is responsible for peace and good order throughout the land, and this responsibility is discharged in various ways:—

(1) He exercises a control over the elements of possible disorder.

(2) He supervises, more or less closely, the police force of counties and towns.

(3) He has to do with the machinery for the administration of criminal justice.

(4) He controls prisons and other places for the detention of convicted persons, or of unconvicted persons charged with crime.

(5) If justice demands that a sentence should be annulled or commuted he advises the King in the exercise of the prerogative of mercy.

(1) The naturalization of aliens may seem but remotely connected with the duties of the Home Secretary in the

He admits to citizenship.

maintenance of the peace, but the Naturalization Act[1] gives to him an absolute discretion, and he may, 'with or without assigning any reason, give or withhold a certificate as he thinks most conducive to the public good.' He is therefore entrusted with the power of determining whether or no a candidate for citizenship is likely to prove a good citizen.

He is further charged with ensuring the observance of the Foreign Enlistment Act[2], and of the Act[3] which confers privileges upon foreign ambassadors and their servants: he preserves, in these respects, the amicable relations of the subjects of the King with those of foreign powers.

His control of secret service money.

The Home Secretary, with the other Secretaries of State and the First Lord of the Admiralty, is entitled to demand a portion of the sum available (£50,000) for secret service within the kingdom. The right and the duty, if occasion

Post Office.

requires, of detaining and opening letters in the Post Office rests in Great Britain upon the Home Secretary, in Ireland upon the Lord Lieutenant. This power, which extends to telegraphic communications, is occasionally, though not fre-

Telegraph.

quently, used[4]. He may for State purposes control the use of the Telegraph[5]; he may obtain, without showing cause, the issue of a writ *ne exeat regno* to keep a subject within the realm; in cases of anticipated disorder he may approve or enforce provisions for the appointment of special

[1] 33 & 34 Vict. c. 14.

[2] 33 & 34 Vict. c. 90.

[3] 7 Anne, c. 12, s. 6.

[4] 7 Will. IV, & 1 Vict. c. 36, extended to telegrams by 32 & 33 Vict. c. 73, s. 23. For instances of the use of this power see Parker, Life and Letters of Sir James Graham, vol. i, ch. xiv, and the Report of a Committee of the House of Commons which sat to inquire into precedents for the action of Sir James Graham in 1844. In this Report (vol. xiv of Parliamentary Papers for 1844) the whole history of the subject is set forth, and it is interesting to note that, in contrast to the indignation excited by the exercise of this power in 1844, the Commonwealth Parliament in 1657 considered that one advantage derived from the existence of a Post Office was the opportunity for discovering dangerous designs against the welfare of the Commonwealth when communicated by letter.

The power was exercised by Sir William Harcourt in 1882. See Hansard, cclxvii. 294.

[5] 26 & 27 Vict. c. 112.

constables[1], and can call in the aid of the Admiralty and War Office when necessary for the maintenance of the peace.

Again, though the Secretary of State is not, as such, a magistrate *ex officio*[2], nor has a general power of commitment, it seems settled that he may commit persons charged with treason or offences against the State, in virtue of an authority transferred or delegated by the Crown[3]. Akin to this direct interposition of the Home Secretary for the maintenance of order may be reckoned his duties in respect of the extradition of persons who have committed crimes in foreign countries and have taken refuge upon our shores.

His right to commit.

The Extradition Acts of 1870, 1873, and 1895[4] lay down rules for the surrender of fugitive criminals, which the King may make applicable by Order in Council to any foreign state with which an arrangement to that effect has been made. The process may be described as follows: the diplomatic representative of the country within whose jurisdiction the crime has been committed makes application to the Secretary of State, who thereupon decides whether the crime is of a political character. Should this be the case he is bound to make no order in the matter. If, however, the crime is non-political and is one of those included in the treaty arrangement between the countries, the Secretary of State sends an order to a police magistrate or justice of the peace for the issue of a warrant for the apprehension of the alleged criminal. Either of these last-mentioned officials may issue such a warrant, but must give notice thereof to the Secretary of State, who can, if he think fit, cancel the warrant and discharge the person

Procedure in cases of extradition.

Limited to non-political offences.

[1] 1 & 2 Will. IV, c. 41, s. 2.

[2] As a Privy Councillor he would be in the Commission of the Peace.

[3] The cases bearing on this point are *Entick* v. *Carrington*, 19 St. Tr. 1030; *R.* v. *Despard*, 7 T. R. 736; *Harrison* v. *Bush*, 5 E. & B. 353. The authorities are not clear or conclusive; but since all Privy Councillors are placed in the Commission of the Peace for every county we need not trouble ourselves to reconcile the *dicta* and decisions of Lords Camden, Kenyon, and Campbell.

[4] 33 & 34 Vict. c. 52; 36 & 37 Vict. c. 60; 58 & 59 Vict. c. 33.

Extradition.

apprehended. At the end of fifteen days, at the least, the Secretary of State may make an order under his hand and seal for the surrender of the criminal to a person duly authorized by the foreign State.

But the alleged criminal must not be surrendered for a political offence, nor be tried for any other crime than that for which he is surrendered, nor for fifteen days at least after his apprehension; nor—if he is charged with any offence committed within the jurisdiction of the English Courts—may he be surrendered until he has been tried and acquitted or has undergone sentence.

Analogous responsibilities and powers, free from some of the restrictions just mentioned, are possessed by the Secretary of State under the Fugitive Offenders Act[1] (1881) in respect of persons accused of offences in one part of the King's dominions and found in another part. He is further required to consent to proceedings against a foreigner under the Territorial Waters Jurisdiction Act[2], and to explain, if called upon to do so by any Court within British dominions, the nature of a jurisdiction claimed under the Foreign Jurisdiction Act[3]. Such, and so miscellaneous are the duties of the Home Secretary in guarding against the possibilities of disorder.

Fugitive offenders.

Territorial waters.

Foreign jurisdiction.

(2) For ordinary purposes we look to the police to keep order. A police force is a local force, and is, in England, with one exception, under the general control of a local authority. The exception is the Metropolitan Police Force in the administrative County of London. But in all cases the Home Secretary exercises supervision or control over the exercise of their powers by county and borough councils.

Police:

in counties,

In counties his sanction is necessary to the appointment of a Chief Constable. He must approve the numbers and pay of the force or any change therein; he must also sanction the rules made for its government and duties, for the distribution of the pension fund, and for the fees payable to police constables for the discharge of certain

[1] 44 & 45 Vict. c. 69. [2] 41 & 42 Vict. c. 73.
[3] 53 & 54 Vict. c. 37, s. 4.

duties. He appoints inspectors on whose report as to the efficiency of the force depends the subvention which is paid towards its maintenance from the Exchequer[1].

In boroughs, which have their own police, the Home Secretary receives reports from these inspectors in order that he may be satisfied as to the payment of this subvention. In the City of London the Commissioner of the City Police is appointed by the Mayor and Aldermen subject to his approval, and he sanctions the regulations made for the force. in boroughs, in London City,

But the Metropolitan Police have been under the immediate control of the Secretary of State ever since they were established in 1829 in substitution for the old local system of watchmen. The Metropolis for this purpose is a district constituted out of portions of the counties of Middlesex, Kent, and Surrey, from which is excepted the area comprised by the City. This district, which by 2 & 3 Vict. c. 47 included any part of a parish or place which was not more than fifteen miles distant from Charing Cross in a straight line, was extended by Order in Council of Jan. 3, 1840, over certain parishes specified in the Order[2]. Within this district the Home Secretary is the police authority. He advises the Crown as to the appointment of the Commissioner, Assistant-Commissioners, and Finance-Officer of the police: the rules for the government of the force, the pay and superannuation allowances of its members, the sites and construction of its buildings, are all determined by him or subject to his approval. in London County.

The Commissioner has the practical and immediate control of the force, but in various details as to traffic in streets and licensing of refreshment houses and cabs, his action must be sanctioned by the Home Secretary, who is responsible to Parliament for the efficiency and good conduct of the force.

(3) As regards the machinery for the administration of justice, he advises the Crown as to the frequency with which assizes should be held, and how, on the occasions The Home Secretary and the Courts.

[1] 51 & 52 Vict. c. 41, ss. 25, 27.

[2] Statutory Rules and Orders Revised, vol. iv, p. 1201.

when assizes are not held in each county, the most convenient arrangements may be made for the trial of prisoners.

As to Recorders.

Where a borough has not only a separate Commission of the Peace, but also a separate Court of Quarter Sessions, a judge of such a Court is appointed by the Crown on the advice of the Home Secretary. This judge is styled the Recorder; an increase to the Recorder's salary, the number of sittings of the Court (beyond four times a year), the appointment of a deputy, are all matters within his discretion[1].

Stipendiary magistrates.

He exercises powers of a very similar character as to the assistant judge of the London Sessions and the stipendiary magistrate of a borough; the appointments of the police magistrates in the Metropolis and the regulation of the business of their Courts are entirely in his hands: he also settles the fees to be taken by Clerks of the Peace and Clerks to the Justices[2], and fixes the salary to be paid to the Clerk of the Peace in lieu of fees: he also fixes the table of fees to be paid to prosecutors and witnesses.

The punishment of crime.

(4) The duties of the Home Office in respect of Prisons are connected with a long history of prison management and discipline which cannot be dealt with here. The institutions to be considered are of four kinds:—

Prisons.

(*a*) The prisons which are used for the detention of unconvicted as well as for the punishment of convicted persons.

As regards these prisons, the process by which the powers of the Home Secretary have grown at the expense of local authorities may be described as, first, inspection; next, regulation; lastly, complete responsibility and control. The three stages are illustrated by the Acts of 1835, 1865, and 1877.

By the last of these, 39 & 40 Vict. c. 21, s. 5, the prisons, their furniture and effects, the appointment and control of all officers, the control and custody of the prisoners, all powers and jurisdiction vested in prison authorities or jus-

[1] 45 & 46 Vict. c. 50, Part viii.

[2] 14 & 15 Vict. c. 55; 40 & 41 Vict. c. 43.

tices in session, at common law, by Statute or by charter, are transferred to and vested in the Secretary of State.

These matters are the subject of rules made by the Secretary of State, and he is further required to make rules as to the execution of a capital sentence within prison-walls, and to receive a certificate from the sheriff charged with the execution, in each case, that these rules are observed [1].

(*b*) Convict prisons to which persons sentenced to long terms of imprisonment are consigned.

Convict prisons.

In respect of these prisons the Secretary of State always enjoyed a special control over their officers, and over the mode of confinement of persons under sentence of penal servitude, the form of punishment substituted in 1857 for transportation [2].

Licences to be at large on condition of good behaviour are granted by the Crown through the Home Secretary [3], and the revocation of such a licence is signified by him to a police magistrate of the Metropolis, who is thereupon required to issue a warrant for the apprehension of the convict, which may be executed anywhere in the United Kingdom and Channel Islands.

(*c*) Asylums for the reception of criminal lunatics.

Criminal lunatics.

The Home Secretary has large powers over persons who are either found to be insane on arraignment, or tried and found by the jury to be guilty of the act charged but insane at the time, or who go mad in prison; he may direct the place of confinement, he has a discretion as to the time of discharge, and he appoints a council for the supervision of the State Asylum for criminal lunatics at Broadmoor [4].

(*d*) Reformatories and industrial schools for the correction of juvenile offenders.

Youthful offenders.

Reformatories.

Reformatories [5] are for offenders under sixteen years of age convicted of an offence punishable with penal servitude or imprisonment, and sentenced to detention in a reformatory, with or without a previous term of imprisonment [6].

[1] 31 & 32 Vict. c. 24. [2] 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.
[3] 27 & 28 Vict. c. 47, s. 3, and 54 & 55 Vict. c. 69.
[4] 23 & 24 Vict. c. 75; 47 & 48 Vict. c. 64.
[5] 29 & 30 Vict. c. 117; 35 & 36 Vict. c. 21, Part i. [6] 56 & 57 Vict. c. 43.

Industrial Schools.

Industrial schools[1] are for children over five years of age neglected by their parents, or not under proper control, vagrant, or associating with criminals.

The Home Secretary in respect of both these institutions appoints inspectors, certifies as to fitness, approves of rules and changes in building, has power of discharging or removing their inmates, and in other minor matters controls their action.

The prerogative of mercy.

(5) There remains in this department of his functions the duty of advising the Crown in its exercise of the prerogative of mercy. This prerogative is nothing more than an exercise of a discretion on the part of the Crown to dispense with or to modify punishments which common law or Statute would require to be inflicted. It is a dispensing power exercisable under strict limitations, and these limitations may be described as threefold[2].

A dispensing power.

Its extent and limits:

Firstly, the prerogative must be exercised in the case of offences of a public character. It is not limited to cases in which the Crown is the prosecutor, for it extends to persons found guilty and sentenced by the House of Lords after impeachment by the House of Commons, but it must be so used as not to affect private rights. It cannot prevent the bringing of an action, or hinder a suit for a penalty recoverable by the individual suing, after such a suit is begun; nor can a recognizance to keep the peace towards an individual be discharged by pardon.

must not affect private rights,

nor anticipate offences,

Secondly, it must not be anticipatory. The middle ages furnish us with instances of charters of pardon for offences not yet committed, which were in fact licences to commit crime; and the Act of Settlement points to the same danger where it enacts that a pardon may not be pleaded in bar of an impeachment. The meaning of this provision is that a Minister who executes a royal command, with an indemnity from the Crown against any legal risk which may

[1] 29 & 30 Vict. c. 118; 35 & 36 Vict. c. 21, Part ii. The law relating to reformatories and industrial schools is in course of amendment and consolidation in the Children's Bill now before Parliament (1908).

[2] See Chitty, Prerogative of the Crown, pp. 88–102.

follow upon obedience, may not set up such pardon or indemnity as a defence to an impeachment by the House of Commons.

only relieves from penalty.

Thirdly, a pardon extends only to the offence which has formed the subject of the criminal proceedings. The defendant's character and credit are cleared and renewed, and thus a disqualification may be removed by pardon which could not be removed by serving the sentence[1]. But a pardon does not affect private rights which may have accrued to the party aggrieved; nor where an office has been acquired by corruption, contrary to the provisions of a Statute, can a pardon do more than relieve from the penalty; it cannot restore the office[2].

Thus the prerogative is a discretionary power to remit or modify punishment for a public offence actually committed, a power which must not be exercised so as to infringe private rights or secure the offender in the proceeds of his wrongdoing.

Form of exercise.

The form of its exercise is by reprieve, commutation, or pardon. In every case a royal warrant is necessary for the remission of the sentence, but the grant of a pardon is attended with greater formality. A pardon was formerly incomplete unless it were under the Great Seal, but since 1827 a sign manual warrant countersigned by the Secretary of State is enough[3], and takes effect at once if it be a free pardon, or, if it be conditional, on the performance of the condition.

The Criminal Appeal Act.

The Criminal Appeal Act 1907[4] has not affected the prerogative of mercy or the duties of the Home Secretary. It has, however, given to him the power, in any case in which the exercise of the prerogative has been sought, of referring the case to the Court constituted under the Act,

[1] *Hay* v. *Justices of London*, 24 Q. B. D. 561. Conviction for felony is a disqualification for selling spirits by retail (33 & 34 Vict. c. 29, s. 14; but a free pardon was held to remove the disqualification.

[2] The acquisition of a benefice by simony, or of an office by a bargain contrary to 5 & 6 Eliz. 6, c. 16, are illustrations of this proposition. Chitty, Prerogative of the Crown, p. 92.

[3] 7 & 8 Geo. IV, c. 28, s. 13.

[4] 7 Ed. VII, c. 23.

or to obtain the assistance of the Court on any point arising out of the petition.

This Court may, on appeal made under conditions prescribed by the Act, on grounds of law or fact, set aside a conviction or modify a sentence. The Court can thus do what the Crown could not do—turn a verdict of guilty into a verdict of acquittal. Pardon, however ample, assumes that an offence has been committed; but the Court can say that there is no occasion for pardon because there was no offence.

(c) *The internal well-being of the country.*

Miscellaneous regulative duties.

It is under this head that the miscellaneous character of the duties of the Home Office is most apparent. Some of these have been taken away by the creation of a Secretary for Scotland, of a Board of Agriculture, and by the increased powers of the Local Government Board. But even thus I will not attempt to do more than classify roughly the duties without referring to the network of Statutes by which they are imposed. Some concern the general health of the community, whether in respect of studies purporting to increase knowledge of the laws of health, as in the Acts regulating schools of anatomy, or the practice of vivisection; or in respect of the wholesomeness of land or buildings, as in the case of the Acts relating to burials, to artisans' dwellings, to sewers, to nuisances, or to open spaces within the Metropolis; or in respect of persons unable to take care of themselves, as lunatics or habitual drunkards.

Health or safety generally,

Some concern the health and safety of those engaged in particular trades, as in the case of the Acts regulating coal and metalliferous mines, the Explosives Act, the Factory Acts.

or in special trades.

Some concern the preservation of things of use and consumption, as the Acts for the preservation of wild birds.

Preservation of useful things.

Some touch on education in so far as it is concerned with industrial schools and reformatories or with the employment of children in factories and mines.

Although the creation of new departments has relieved the Home Office from some portion of its miscellaneous

duties, yet the tendency of legislation is to increase the minuteness, complexity, and volume of those which remain. The Factory Act of 1901 will serve to illustrate this. And if this last group of duties was wholly removed, the Home Secretary would still be the chief organ for the expression of the royal will in administration, the Minister responsible for the maintenance of the King's peace and for the exercise of the prerogative of mercy.

§ 5. *Local Government*[1].

Topics of Local Government.

The topics assigned to local authorities show a constant tendency to increase in number and complexity. The administration of the Poor Law, that is, the rendering of relief to persons unable to support themselves; of the laws relating to public health; of the licensing laws; the maintenance of a police force; of highways and bridges; the provision of asylums for persons of unsound mind; the acquisition of land for small holdings, and, generally, the administration of the law relating to such holdings, to allotments, open spaces, and public footpaths—all these are the subject-matter of local government, nor is the list exhaustive.

Education in all its branches is also committed to the charge of local authorities, though here the councils concerned are able to avail themselves to some extent of outside assistance from persons willing to serve on Education Committees, or assist in other branches of the work.

I am here concerned with the relation of local authorities to the central government, and the topics of local government concern me only in so far as they illustrate this relation, or bring into play the action of different departments. But we must needs first consider the two great

[1] For obvious reasons of space and proportion I have confined what I have to say on Local Government to England. It may be enough to mention that Scotland has its Public Health Act, 30 & 31 Vict. c. 101, and Local Government Acts, 52 & 53 Vict. c. 50, and 57 & 58 Vict. c. 58. Ireland its Local Government Acts, 34 & 35 Vict. c. 109, and 35 & 36 Vict. c. 69; 61 & 62 Vict. c. 37. The working of these is supervised by Local Government Boards for Scotland and Ireland.

divisions of local government, rural and urban, and the matters with which they are mainly concerned.

Rural Local Government.

The Township:

One can but sketch in the barest outline the history of local government in what are now known as rural areas down to the great change effected by the Local Government Act of 1888. In the Saxon scheme of local government the township, or vill, stands at the bottom of the scale; feudalized later into some sort of correspondence with the manor, though the vill might include more than one manor, and the manor in its turn might contain a group of vills. But the duty of the township was to send four men and the reeve to the County Court. Where more than one manor was included in the township this duty was apportioned among the respective lords; and thus the township stands out as a unit distinct from the manor[1].

the Hundred:

Above the township came the hundred[2], a division of the county varying greatly in size in different parts of England, and the hundred had a Court, and certain communal duties; but these have long passed into abeyance.

the Shire moot:

So too had the work of the County Court—the shire moot wherein the business of the freeholders, judicial, civil, ecclesiastical, and military was conducted before the three presiding officers, the sheriff, the bishop, and the ealdorman[3]. But we need not follow the vicissitudes of the County Court; it is enough to say that for all practical purposes of administration the County Court, like that of the hundred, had ceased to exist.

the Justices of the Peace.

The great mass of the administrative work of a county, created by a long series of statutes, had been imposed upon the justices of the peace, sitting in quarter or special sessions; but the justices, though the most important element in county administration, formed but one of many authorities to whom the business of a rural area was

[1] Pollock and Maitland, Hist. of English Law, vol. i, p. 547, and ch. 3, § 7.

[2] The division is termed a *wapentake* in the counties of York, Lincoln, Derby, and Nottingham, and a *ward* in the northern counties.

[3] Stubbs, Const. Hist. i. 117.

assigned. The Parish, with its overseers, the Union with its Board of Guardians, the Sanitary authority or Local Board, the Highway Board, the Burial Board, the School Board combined to distract and confuse the legislator, the administrator, and the student. Rural authorities in 1888.

The administrative bodies for purposes of rural local government, since the legislation of 1888 and 1894, are the Parish Council, the District Council, the Administrative County, and, for certain purposes, the Justices of the Peace. Modern local authorities.

The Parish may be described as an interloper in our system of local government, as usurping the place which the township or vill should rightfully occupy. The parish was a purely ecclesiastical institution until 1601—when the provision for relief of the poor was taken up by the State and imposed as a duty upon the localities concerned [1]. The assembly of the parish had been used to meet to choose churchwardens and transact such business as was necessary for the maintenance of the services, fabrics, and ornaments of the church. This organization was ready to hand when a rate was ordered to be levied for the relief of the poor, and the administrative duties connected therewith were assigned to the churchwardens and to overseers nominated by the vestry and appointed by the justices of the peace. The Parish: ecclesiastical,

In the South of England, where parish and township were for the most part conterminous, this legislation worked easily: but in the north, where parishes were of great extent and might comprise several townships, difficulties arose. These were met by making the township the parish for poor-law purposes, and thus the civil parish came into existence [2]. And so the parish becomes an administrative unit; and, for purposes of local government, means a place for which a separate poor rate is or can be made, or for which a separate overseer is or can be appointed [3]. The framers of the Act of 1894 adopted this definition of a parish and, confining the operation of the Act to rural parishes, made provision for such a rectification of boundaries as would prevent any parish from extending civil.

[1] 43 Eliz. c. 2. [2] 14 Car. II, c. 12.
[3] Interpretation Act, 52 & 53 Vict. c. 63.

into more than one administrative county. The rural parish thus constituted was endowed with local self-government through the agency of a Parish Meeting; and, where the population amounted to 300 or more, of a Parish Council. The Parish Meeting consists of the parochial electors who are persons on the register either for local government or parliamentary elections: this body must meet annually, or, if there is no Parish Council, twice in the year, and one meeting must take place on or within seven days of March 25.

The Parish Meeting.

The Parish Council.

Every parish must have a Parish Meeting; every parish with a population of 300 or more must have a Parish Council. If its population is 100 or more it may obtain a Council, as of course, on application to the County Council: if its population is less than 100, the consent of the County Council is needed as well as the request of the Parish. The County Council fixes the number of Councillors, which may vary from five to fifteen, and the Council, which holds office for three years [1], is bound to meet four times a year.

Business of the Parish Council.

Its business is the annual appointment of a chairman and overseer of the poor; the charge and management of the non-ecclesiastical property and documents of the parish: the hiring of land for allotments and small holdings, either by arrangement, or, with the consent of the County Council, by compulsion; the treatment of some minor sanitary matters; and, with the assent of the Parish Meeting, the enforcement of the Adoptive Acts. In furtherance of these purposes, apart from the expenses incident to the Adoptive Acts [2], a Parish Council may levy, on its own authority, a rate of 3*d.* in the £1 or of 6*d.* with the assent of the Parish Meeting.

The Rural District Council.

Next above the Parish Council comes the District Council. The Rural District Council takes its origin in the Poor Law Union, or group of parishes united for the

[1] 62 & 63 Vict. c. 10.

[2] These are set out in 56 & 57 Vict. c. 73, s. 57; the Baths and Washhouses Acts, 1846, 1882; the Burial Acts, 1882, 1885; the Public Improvements Act, 1860; and the Public Libraries Act, 1892.

administration of the Poor Law, the creation of the Poor Law Amendment Act of 1834. The Union had been made the Sanitary Authority under the Public Health Act 1875, but as that Act divided the country into rural and urban districts, the Union or Board of Guardians as a Sanitary Authority was liable to be cut in two if, as a Poor Law Authority, it was partly rural and partly urban. The Local Government Act of 1894 turned this authority into the District Council, and made provision that each District Council should be kept within the limits of an administrative county.

The Guardians of the Poor had contained a large *ex-officio* element—the Justices of the Peace—and had been elected on a franchise which proportioned the number of votes which each elector might give to the amount at which he was rated to the relief of the poor. The *ex-officio* element was struck out, and no elector was given more than one vote. The Guardians of the Poor.

The District Council is now the Board of Guardians, the Sanitary Authority, and the Highway Authority for its area, and has also taken over certain miscellaneous administrative powers hitherto enjoyed by the Justices of the Peace, as to the granting of licences other than licences for the sale of alcoholic drink, and other matters. Business of District Council.

The District Council has grown out of two institutions, each comparatively new, the Guardians of the Poor and the Rural Sanitary Authority; but the County Council takes us back to the shire moot of early days, though we must not suppose that the Council of the modern administrative county has much to do with the old county organization. The County Council.

The shire moot is the home of our representative institutions. Thither in Saxon and feudal times came the great lords and ecclesiastics of the shire, the knights and freeholders; the twelve lawful men from each hundred; and, from each township, four men, the reeve, and the parish priest. There justice was administered, taxation was assessed, the business of the shire transacted. But in feudal times the presiding officers underwent a change, the ealdor-

man ceased to exist; the Bishop attended at full sessions of the court, but ceased to be a presiding officer after the severance of the ecclesiastical and civil jurisdictions. And gradually the business of the County Court came to be dealt with elsewhere. Its functions for purposes of taxation and the discussion of matters of general concern practically ceased when representatives of shire and town were sent from the County Court to deal with these matters in Parliament. The King's justice, civil and criminal, effaced the local jurisdiction. Until 1872 the knights of the shire were formally elected in the County Court, and until 1880 the Coroner, who held the pleas of the Crown, was also there elected. These survivals were swept away by the Ballot Act of 1872 and the Local Government Act of 1888. Perhaps the only thing that could now happen to a man in the ancient County Court is the proclamation of his outlawry.

Its decadence:

the Justices of the Peace.

The administrative and judicial work of the county, which might have been done by a representative body, passed by a long series of Statutes to the Justices of the Peace, officers appointed by royal commission, usually by the Chancellor on the nomination of the Lord Lieutenant of the county, sometimes directly by the Chancellor. We may find that the Justice of the Peace is a more important personage when we deal with the Courts, for the judicial functions have survived the administrative. The most important of these last were the management of county finance, of the county police, and the grant, at special sessions, of licences for the sale of intoxicating drinks.

The administrative County.

This last, which is regarded as partly a judicial function, remains to the justices; the management of the police, as we shall see, is shared with the representatives of the County Council; the rest of the administrative work is, with very trifling exceptions, transferred to the Council. But the old county organization survives, not only in the Justice of the Peace, but in the great officers of the County, who have duties which are distinct from those of the *administrative County*.

The officers of

The Sheriff has from the earliest times represented the central authority in the execution of the law. Thus he

is the returning officer to whom writs are sent for the return of members for the Parliamentary divisions of the County. He fixes the days for nomination and polling, and informs the Clerk of the Crown as to the persons elected: he summons juries, and executes the judgments of the superior Courts in respect of persons or property within the county. Every year, on the morrow of St. Martin's Day, three landowners of the county are selected by the Chancellor of the Exchequer, the Judges, and other officers of State sitting in the King's Bench Division of the High Court of Justice. The choice of one out of the selected three is made by the King in Council, and the Sheriff is appointed by a warrant signed by the Clerk of the Council [1].

the County: the Sheriff,

The Lord Lieutenant came into existence in the reign of Henry VIII; in the following reign he took from the Sheriff the control which the latter had exercised over the military forces of the County. The military reforms of 1871 took from him the command of the Militia, the Yeomanry, and the Volunteers, but the Territorial Forces Act of 1907 brings him again into prominence in his relation to local reserve forces. Beyond this he appoints deputy lieutenants, and submits names to the Lord Chancellor of persons suitable to be placed on the Commission of the Peace.

Lord Lieutenant,

The Custos Rotulorum is the Keeper of the Records and the principal Justice of the Peace for the County. The office is almost always held by the Lord Lieutenant, but separate patents are made out for each office. The Lord Lieutenant is appointed by powers conferred on the Crown by the Militia Act 1882 [2], and recited in the patent. The King appoints to the more ancient office of Custos Rotulorum by virtue of Common Law Prerogative.

Custos Rotulorum,

The Coroner's office is one of great antiquity: he holds inquests in cases of sudden death; on the finding of these inquests indictments for murder or manslaughter may be founded. He was formerly elected, except in certain cases,

Coroner.

[1] 50 & 51 Vict. c. 55.

[2] 45 & 46 Vict. c. 49, s. 29.

by the freeholders of the county. He is now appointed by the County Council.

Connexion of local and central Government.

Thus we have the connexion of rural administration with central government established, up to a certain point, by these ancient offices. The Sheriff for the execution of the decision of the Courts, as the immediate representative of the Crown: the Lord Lieutenant for the local reserve of military force: the justices of the peace for a mass of judicial business, and the quasi-judicial business concerned with the licensing laws: the Coroner in certain cases where the King's peace or the King's interests may be concerned.

The modern County Council.

But a popularly elected body, the County Council, now transacts the general business of the county, including most of the work which was formerly done by the Justices of the Peace, and a good deal more. And this Council is kept in close and constant relation to the central Government. The Local Government Act of 1888 created the *administrative county*. This administrative area does not always coincide with the area of the ancient county, or the county for judicial and Parliamentary purposes[1]: and there is a considerable number of large towns[2] which have been constituted administrative counties, or county boroughs: these are for most purposes separate from the county in which they are geographically situate, and their councils possess not merely the powers enjoyed by a Municipal Corporation, but also the powers of a County Council under the Act of 1888.

Its composition.

A County Council consists of a chairman and vice-chairman, aldermen and councillors. The Local Government Board fixes the number of councillors, and the electoral divisions of the county: each division returns one councillor, and the qualification of the elector, as set out in the County

[1] There are sixty-three administrative counties in England and Wales, for Yorkshire and Lincolnshire are each divided into three, and Sussex and Suffolk into two administrative areas, while the Isle of Wight is severed from Hampshire, the Soke of Peterborough from Northamptonshire, and the Isle of Ely from Cambridgeshire; and London is also a county.

[2] There are now seventy-one county boroughs.

Electors Act 1888, is either the burgess qualification of the Municipal Corporation Act 1882, or the £10 occupation qualification for the vote at a Parliamentary election for a county, under the Registration Act 1885[1].

The aldermen are one-third in number of the councillors; their qualification is the same as that of councillors. They are elected for six years; councillors for three.

Its duties: general,

The duties of the County Council can only be shortly touched on. The finance of the county, the appointment and removal of the officers of the county (except the Clerk of the Peace and the justices' clerks), the provision for pauper lunatic asylums, and reformatory and industrial schools, the charge of bridges, the grant of licences for music, dancing, and racecourses, are perhaps the more important of the duties taken over from the Justices of the Peace. From the highway authorities comes the charge of the main roads.

the making of by-laws,

An important power conferred in the Act of 1888 was that of making by-laws either 'for good rule and government' or 'for the suppression of nuisances.' The former come into operation after submission to the Home Secretary for forty days, during which time they may be disallowed by the King in Council[2]; the latter must be approved by the Local Government Board[3].

Education,

By the Education Act of 1902 the County Council is brought into contact with another department of the central Government—the Board of Education. The County Council is the Local Education Authority for purposes of elementary education throughout its area, except for elementary education in the case of boroughs of 10,000 and urban districts of 20,000 inhabitants[4]. It is also,

[1] The County Electors Act, 51 Vict. c. 10. The Municipal Corporations Act, 45 & 46 Vict. c. 50. The Registration Act, 48 Vict. c. 15. The qualification under the Municipal Corporations Act is (1) occupation during the twelve months preceding the 15th of July in any year of a house, warehouse, shop, or other building in the area; (2) residence in or within seven miles of the area; (3) rating of qualifying property to poor rate of parish; (4) payment of all rates due in respect of it of preceding 5th of January by the 20th of July.

[2] 51 & 52 Vict. c. 41, s. 16.

[3] 38 & 39 Vict. c. 55, ss. 102-87.

[4] 2 Ed. VII, c. 42, s. 1.

without these exceptions, the authority for higher education. The Council may, however, delegate all its powers in this respect, other than that of raising a rate or borrowing money, to a Committee, on which there must at least be a majority of members of the Council [1]. Subsequent enactments have made this authority responsible for the medical inspection of children [2], and have given powers to provide meals for children under certain conditions [3]: in this last matter, however, the Local Authority may associate itself with voluntary agencies.

relations of Council and Board of Education.

It will be seen that as regards elementary education a County Council has duties cast upon it of a definite character which the Board of Education has the means of enforcing [4]. In respect of higher education the duty is less precisely stated, and the Council may find that public schools, training colleges, and other institutions are already in possession of a part of the ground.

Nevertheless, the counties have set themselves in nearly all cases to frame schemes and carry them into effect so as to raise the standard and co-ordinate the branches of education within their areas, while the Board of Education, by means of the funds placed at its disposal for higher education, can exercise an influence on local action. Regulations governing the distribution of these funds may act as a guide or as a check to the local authority, which is tolerably certain to be glad of pecuniary assistance.

Small Holdings and the Board of Agriculture.

Yet another Government department is now brought into close relations with County Councils by the Small Holdings Act of 1907 [5]. By this Act the Councils are required to frame schemes for small holdings within their areas, to invite applications for such holdings, to acquire land for the purpose, and to assume the position of landlords on a large scale, under pain of having the process effected for them by the Board of Agriculture.

It is enough to note the new relations to the central authority effected by an Act which is now only coming into operation.

[1] 2 Ed. VII, c. 42, s. 17. [2] 7 Ed. VII, c. 43, s. 13. [3] 6 Ed. VII, c. 57.
[4] 2 Ed. VII, c. 42, s. 16 and 4 Ed. VII, c. 10. [5] 7 Ed. VII, c. 54.

We thus find two authorities for the county, the one administrative the other mainly judicial, discharging their respective functions side by side, and at times brought into joint action. The Justices and the Council.

The County Council, a corporate body, elected, and representative, stands in necessary relations to the Home Office, the Local Government Board, the Boards of Education, and of Agriculture, and to the Privy Council: it is brought into contact for various purposes with District and Parish Councils. The County Council and central Government.

The Justices of the Peace exercise summary jurisdiction at general petty sessions, and at special sessions administer the law as to the licensing of premises for the sale of alcoholic liquor. At Quarter Sessions they try indictable offences, hear rating and licensing appeals; they appoint a Visiting Committee to visit the Prison, and report thereon from time to time to the Home Office, and a Licensing Committee for the purposes of the Act of 1904 [1]. Their connexion with the central Government is through the Chancellor, by whom they are appointed and may be dismissed, and the Home Secretary in respect of the administration of justice, of the Prison rules and the licensing laws. The Justices of the Peace and central Government.

But there is a meeting-point of these two county authorities in the, annually appointed, Standing Joint Committee, a body composed of representatives of the Justices and the Council. This Committee is responsible for the police force of the county. It appoints the Chief Constable subject to the approval of the Home Office, fixes the number of the police force, is responsible for the maintenance of the police stations and assize courts, and appoints the Clerk of the Peace, who is also the Clerk of the County Council. The Standing Joint Committee.

We may summarize roughly the distribution of public work in a county. The District Councils are the poor law and sanitary authorities; the Justices of the Peace are responsible for the administration of justice and of the licensing laws; the Standing Joint Committee are the authority for the police force; the rest of local administration, an ever-growing burden, falls on the Council of the County. Distribution of County business.

[1] 4 Ed. VII, c. 23.

Urban Local Government.

The Borough.

The history of the borough is a long one, and I will only indicate some of its landmarks.

The *burh* or walled town of Saxon times became the chartered borough of the Norman kings, which bought exemption from the assessment and jurisdiction of the shire[1]. From the end of the reign of Henry III such charters are not infrequent, all pointing to the same objects—the exclusion of the Sheriff, the election by the town of its own magistrates, and the determination of its own pleas apart from the County Court[1].

Its early history.

The constitution of these towns greatly varied, but from the reign of Henry VI onwards the tendency of charters which either conferred or regulated corporate rights was to diminish the rights of the townsmen and to increase those of the magistracy. The mayor and aldermen, or the corporate governing body, acquires the rights which had belonged to the freemen at large. More especially is this the case where a charter confers the right to return members to serve in Parliament.

While the King retained the power of appointing and dismissing the judges by whom the validity of these charters might be tried, the boroughs which returned members to the House of Commons were always liable to have their charters questioned, annulled, and remodelled to suit the political requirements of the King. The dealings of Charles II and James II with the borough charters are significant on this point. But in 1700 the Crown lost its control over the judges, and in 1832 the borough representation was settled by Statute. In 1835 the confused and multifarious borough constitutions were dealt with by the Municipal Corporations Act[2]: a model constitution was designed for corporate boroughs, and to these all existing incorporated boroughs, and such as might hereafter be chartered, were made to conform. The substance of this Act and of numerous

The Municipal Corporations Acts.

[1] Stubbs, Const. Hist. i. 408–12. [2] Ibid., ii. 217, 219.
[3] 5 & 6 Will. IV, c. 76.

amending Acts was consolidated in the Municipal Corporations Act, 1882 [1].

The Public Health Acts.

But a town need not be a *municipal borough* in order to possess an organization distinct from that of the county. It may be an *urban district*. The Public Health Act, 1875, divided all England and Wales into sanitary districts, rural or urban, and the Urban Sanitary Authority or Local Board, which was constituted in 1875 for carrying out the provisions of the Public Health Act, has become the Urban District of the Local Government Act of 1894.

The Municipal Corporation.

The Municipal Corporation is constituted by royal charter, granted by the King with the advice of the Privy Council, on petition of the resident householders of the town.

The Corporation consists of the burgesses, that is the ratepayers, a mayor, and aldermen. It acts through the Council, consisting of mayor, aldermen, and councillors. The burgesses elect the councillors, the councillors elect the aldermen, and the entire Council elects the mayor.

Its functions.

The Council so constituted administers the corporate property of the borough. Where the income of this property is insufficient to meet local purposes, a rate may be levied, and a return of income and expenditure for each year must be laid before the Local Government Board, though, except as to its education expenses, the accounts of a municipal corporation are not subject to the audit of the Board. For the sale of land forming part of the corporate property or for raising a loan on the security of that property the consent of the Local Government Board [2] must be obtained.

The Urban District.

The Urban District is not the creation of the Crown in Council, but is brought into existence and its area defined by the County Council or the Local Government Board. The County Council in this respect has large powers which the Local Government Board may control on the petition or by the consent of local authorities.

The Urban District is essentially a sanitary authority.

[1] 45 & 46 Vict. c. 50.

[2] Substituted for the Treasury (as in the Municipal Corporations Act, s. 106) by s. 72 of the Local Government Act, 1888.

but it is also, within its area, a highway authority; if it has a population of more than 20,000 it is an authority for elementary education, and it possesses some other miscellaneous administrative powers.

Comparison of their powers.

A municipal borough is also an urban sanitary authority, and we may thus compare the borough and urban district as respects their constitution and powers. I have described the different ways in which these two corporate bodies come into existence: the urban district council is more democratic in composition since it possesses no aldermen: as regards powers, the urban district council does not, under any circumstances, control its own police; a borough, if of more than 10,000 inhabitants, may do so; nor has an urban district ever a separate Commission of the Peace, as may be the case with a borough. For all purposes of carrying out the laws of health the two forms of urban government possess the same powers, but the by-law-making power of the urban district is governed by the Public Health Acts, and its exercise is entirely under the control of the Local Government Board [1], while a municipal corporation may also make by-laws for the good rule and government of the town, which are submitted to the Home Secretary, and, unless disallowed by the Privy Council, become valid in forty days [2].

Audit.

The urban district has the power to impose a district rate, and in respect of raising money by loan is placed on the footing of a municipal corporation, but its accounts are subject to the audit of the Local Government Board.

Poor Law administration.

Urban, as compared with rural, local government lacks completeness. Neither the urban district council nor the municipal borough administer the Poor Law. Side by side with the urban district council is the Board of Guardians, who are, since 1894, entirely an elected body. The Parish also is unchanged in urban districts. The sequence of Parish, District, and County Council, and the identity of the Guardians of the Poor with district councillors is confined to rural districts.

[1] 38 & 39 Vict. c. 55, s. 187.

[2] 45 & 46 Vict. c. 50, s. 23.

The relation of borough or of the urban district to the county in which it is situate needs to be noted. Relations of County and Urban Government.

The County borough is an administrative county of itself, and is practically outside the county area[1]. The boroughs which are not county boroughs may be divided into those which have a population of 10,000 and upwards and those which fall below that number.

Those which are above 10,000 may again for certain purposes be subdivided into those which have a separate commission of the peace, with or without a separate Court of Quarter Sessions, and those which have not. But the division in respect of population is important in two respects.

The boroughs with the larger population are independent of the county in respect of the maintenance of a police force, which is raised by the borough and controlled by its Watch Committee. They are also independent as regards the provision of elementary education for the children within their area.

The urban district council has similar independence as regards education if the population of the area exceeds 20,000.

With these and some other less important exceptions, it may be said that the non-county borough and urban district are parts of the administrative county in which they are situate.

Before leaving the subject of urban government it may be worth taking note of urban terminology. Terminology.

Town is a term of very indefinite use. Blackstone says[2] that a town or township is synonymous with tithing or vill, and consists in the possession of 'a church with divine service, sacraments, and burials'; this he admits to be an ecclesiastical rather than a civil distinction, but he offers no other. He negatives the possession of a market as the distinguishing feature of a town, and suggests that it consisted in a *tithing* or group of ten families; but this was an association for police purposes. A town.

City used to be A city.

[1] There are seventy-one such boroughs.

[2] Comm., vol. i, p. 115.

defined as a town which possessed or had possessed a cathedral, but it is now merely a term of distinction sometimes conferred on great towns by letters patent, as upon Birmingham and Dundee [1].

A borough.

Borough was formerly defined as a town, corporate or not, which sent members to Parliament, but the term is now properly applied to boroughs incorporated under the Municipal Corporations Act.

A county corporate.

The county corporate was a town placed by royal favour in the position of a county, being exempt from the jurisdiction of the shire, possessing a sheriff of its own, having a separate commission of oyer and terminer and gaol delivery for the trial of offences committed within its boundary, and being for parliamentary purposes in a somewhat different position to other towns. But legislation as to municipal powers and on the subject of the franchise has reduced the distinction of these ancient borough counties to something merely nominal.

A county borough.

There remain the county boroughs of the Local Government Act 1888. These are boroughs which either possess a population of not less than 50,000, or having a large population were also counties corporate. In these the mayor and council, as constituted by the Municipal Corporations Act, are invested with such larger powers as are conferred on the council of an administrative county.

Local Government and the Central Executive.

The local administrative bodies which I have described are controlled for most purposes by the Local Government Board. Similar departments, somewhat differently constituted, exist for Scotland [2] and Ireland [3], the one presided over by the Secretary for Scotland, the other by the Chief Secretary to the Lord Lieutenant.

I confine myself to the consideration of English local government, and will note very briefly the history of the duties as to the Poor Law, as to the creation of local ad-

[1] London Gazette, Jan. 18, 29, 1889. [2] 57 & 58 Vict. c. 58.
[3] 35 & 36 Vict. c. 69 and 61 & 62 Vict. c. 37.

ministrative bodies, and as to public health, which were assigned to the central department in 1871 [1].

(a) *The Poor Law.*

The Poor Law Board.

The administration of the Poor Law Amendment Act of 1834 [2] was vested in Commissioners appointed for a term of five years. This commission was renewed annually from 1839 to 1842, and was then re-appointed for five years. Its existence without a Parliamentary chief was not altogether happy [3], and in 1847 a Poor Law Board was constituted, consisting, like the phantom Boards which I have mentioned, of various great Officers of State, who with others nominated by the Crown were made, by letters patent, Commissioners 'for administering the relief of the poor in England.' One of these Commissioners was to be styled the President; the Commissioners were to appoint two Secretaries, and the office of President and of one of the Secretaries was made compatible with a seat in the House of Commons.

Its history.

Its end in 1871.

The President of the Poor Law Board with the Parliamentary Secretary was responsible to Parliament for the administration of the Poor Law from 1847 to 1871, and the office of President was held from time to time by a Minister of Cabinet rank. In 1871 the Poor Law Board ceased to exist, and its powers and duties were vested in the Local Government Board.

(b) *Public Health.*

Commencement of sanitary legislation.

Until the year 1847 there was no general legislation on sanitary matters. The Municipal Corporations Act (1835) gave power to the towns, which were or might hereafter be included in it, to make by-laws on various local matters, including the prevention of nuisances, and certain towns obtained special Acts of Parliament to enable them to carry out improvements. These Acts specified the improvements and the local Commissioners by whom the

Improvement Acts.

[1] 34 & 35 Vict. c. 70.

[2] 4 & 5 Will. IV, c. 76.

[3] Bagehot, English Constitution, 189.

improvements were to be effected and maintained. In 1847 were passed the Improvement Clauses Act and the Commissioners Clauses Act[1]. These Acts supplied common forms, the one for the election, meeting, powers and duties of the local improvement Commissioners, the other for the nature, mode of execution, and machinery for payment in respect of the improvements contemplated. Thus it was possible to make the local improvement Acts uniform and efficient.

Public Health Act, 1848.

In 1848 was passed the first Public Health Act[2]. This Act empowered local authorities to deal with many matters relating to health, drainage, water supply, removal or prevention of nuisances, offensive trades, street paving, common lodgings, burial-grounds.

The powers so created might be exercised by three different bodies. The Town Council, where the town was incorporated under the Municipal Corporations Act; the Improvement Commissioners, where these existed apart from a municipal corporation; the Local Board, a new institution, which might be brought into existence by Order in Council, on petition of the ratepayers addressed

The Board of Health,

to a newly constituted Board of Health, or on the initiative of this Board where the sanitary arrangements of a district were especially bad. The Board of Health, variously constituted, acted as a central authority in sanitary matters for ten years, from 1848 to 1858, when it was allowed to

its duties transferred

expire. Its functions as regarded the prevention of diseases were assigned to the Privy Council, while those which related to the constitution of Local Boards fell to the Home Office, under the provisions of the Local Government Act of 1858[3].

This Act amended the provisions of the Public Health Act, 1848, mainly as to the constitution and powers of the local authorities. The intervention of the Privy Council was no longer needed for their creation. A resolution of the Town Council in case of a municipal corporation—a resolution of the improvement Commissioners in a town which was under a local improvement Act, a resolution

[1] 10 & 11 Vict. cc. 16, 34. [2] 11 & 12 Vict. c. 63. [3] 21 & 22 Vict. c. 98.

of the ratepayers in places which had neither a Town Council nor an improvement Act, but did possess a defined boundary[1]—might be laid before one of His Majesty's Principal Secretaries of State, in practice the Home Secretary. A vote of the ratepayers so signified to the Home Secretary, and published by him in the London Gazette, was enough to constitute the Local Board. The exercise of their powers by these Boards was controlled by a sub-department of the Home Office, called the Local Government Act Office.

to the Home Office

From 1858 to 1871 the Home Office created and controlled local sanitary authorities, and the Privy Council enforced sanitary rules. This arrangement proved cumbrous in working. The functions of government connected 'with the supply of requisites for public health as at present regulated, after wandering through a labyrinth of local authorities, may be traced up to no fewer than three chief offices, the Privy Council, the Home Office, and the Poor Law Board; whilst certain collateral matters find their way to the Board of Trade.' So ran the report of the Sanitary Commission of 1869.

and Privy Council;

In 1871 the duties of Home Office and Privy Council alike were assigned to the newly-constituted Local Government Board. In 1872 the whole of England and Wales was divided into rural and urban sanitary districts[2]. In the former the Board of Guardians constituted the local sanitary authority, in the latter the Local Board above described.

and in 1871 to Local Government Board.

In 1875 the Public Health Act[3] consolidated the law upon the subject, and gave increased powers to the Local Government Board for creating and dissolving local sanitary authorities, for defining or changing their boundaries, and merging one district with another or turning that which was rural into urban, for instituting inquiries and compelling defaulting authorities to do their duty, either

[1] A place which did not possess a known boundary had to petition the Home Secretary to settle its boundaries before it could proceed to the constitution of a local authority.

[2] 35 & 36 Vict. c. 79.

[3] 38 & 39 Vict. c. 55.

on its own initiative or at the instance of persons aggrieved[1]. The district Council has now become the rural sanitary authority, and in towns either the Urban District Council or the Municipal Corporation administers the laws relating to Public Health.

(c) *Central Control.*

Local Authorities are brought into relations with various departments of Government, as I have shown, but the Local Government Board is the department specially constituted to supervise, aid, and control them.

Inspection.

The forms in which the central control manifests itself are various. The Board can inform itself of the action of the local authorities in the administration of the Poor Law and the law relating to public health by means of inspection; and the liability to inspection lies at the base of the connexion between local and central Government.

Orders and Regulations.

The Board may, on information thus acquired, or where necessary without special inquiry, make Orders or Regulations as to the mode of carrying out statutory duties imposed on local authorities. These orders are made in pursuance of statutory powers[2]. Where they are general they must lie before Parliament, and may be revoked by Order in Council. Where they are special they relate to some individual default of an authority in the discharge of its duty. Disobedience to an order may result in an application to the King's Bench Division for a *mandamus* to compel performance.

Model By-laws.

It is well to distinguish from Orders and Regulations of this sort the model By-laws which are from time to time issued by the Board. By-laws which may be made by Local Authorities for purposes of public health must be submitted to the Board. It is for public convenience, therefore, that the Board publishes model By-laws which serve

[1] The history of sanitary legislation, from the point of view of the expert in sanitary matters, is fully set forth in English Sanitary Institutions, by Sir John Simon.

[2] See 4 & 5 Will. IV, c. 76, s. 15; 38 & 39 Vict. c. 58, ss. 130, 134, 139.

to indicate the lines on which Local authorities may frame their rules without fear of disallowance.

Financial control is exercised in two ways. The accounts of every local authority except those of Municipal Boroughs are subject to audit, and in the case of these Boroughs their education accounts are not exempt from this process. What the auditor of the Board disallows becomes a surcharge falling upon those who incurred the expenses in question, and this is a substantial check on any departure from the lines within which extravagance is permissible at the cost of the ratepayer of to-day. The check on extravagance which may be a burden in the future is provided by the requirement that the sanction of the Board should be given to any loan raised by a local authority [1]. A loan raised without such authority would furnish a very poor security to the lender.

Audit.

Loans.

Inspection, Regulation, Audit of accounts, and restraint of borrowing powers are perhaps the main features of central control over local institutions. But they do not exhaust the forms or methods by which the local authorities are brought into contact with the departments of Government. Both the Local Government Board and the Board of Education possess powers of a judicial character for dealing with controversies between one set of authorities and another. Approval of appointments of officers, formation of areas, directions as to procedure, are some modes in which a Government department can make itself felt in local affairs. In some respects we may complain of laxity, in others of excessive minuteness, of control. It is enough for me to point out its general character, and the process by which local independence is combined with a certain homogeneity of institutions and their working [2].

General control.

[1] 38 & 39 Vict. c. 83.

[2] I have not thought it desirable to annotate this section with the references which a subject so full of technical detail might seem to demand. The reader who wants fuller or more precise information should refer to Wright and Hobhouse on Local Government, or the editions of the Local Government Acts of 1888 and 1894 by Macmorran and Dill. But for a full account of the history and law of the subject the treatise of Dr. Redlich on Local Government in England furnishes the

Section II

The Adjacent Islands

§ 1. *The Isle of Man.*

Isle of Man.

The Isle of Man has been in allegiance to the English Crown since the reign of Henry IV, but subject to its own laws and the jurisdiction of its own Courts. From the reign of Henry IV until 1735, with an interval during Elizabeth's reign, it was held of the Crown in fee by the House of Stanley. The tenure was on terms of doing homage and presenting two falcons to King or Queen at the Coronation. It then passed by inheritance to the Dukes of Athole, by whom the feudal rights were sold to the Crown in 1765, with a reservation of certain manorial rights and of the ecclesiastical patronage. These were bought by the Crown in 1829[1].

Executive.

A Lieutenant-Governor represents the Crown in the Island. He is appointed by sign manual warrant, accompanied by a letter of instructions. The police and the officials of the prison are responsible to him, and he appoints to offices in these departments, and also in the militia, a local defensive force of town and parish companies. The Governor himself is responsible to the Home Secretary, without whose permission he cannot leave the Island.

Legislature.

The Legislature of the Island consists of two Houses, the Governor in Council, and the House of Keys; the two sitting in Session make up the Court of Tynwald. The Acts of this body require the assent of the Crown in Council for their validity.

The Imperial Parliament determines the amount of the customs duties. The Imperial Government controls and collects them. If, after meeting the cost of government and contributing £10,000 to the consolidated fund, there

fullest and clearest information now available. It is to be regretted that throughout this treatise there should run a thread of political commentary, not necessary nor always just, and more appropriate to party journalism than to a great work of historical and analytical exposition.

[1] The purchase was sanctioned by 6 Geo. IV, c. 34.

remains a surplus, its disposal rests with the Court of Tynwald.

The Council of the Island consists of the Governor, Bishop, Archdeacon, Vicar-General, Attorney-General, Clerk of the Rolls, two Deemsters, and the Receiver-General: all these officers are appointed by the Crown, except the Vicar-General, who is appointed by the Bishop. Council.

The members of the House of Keys are twenty-four in number. Until 1866 they held seats for life, but could resign with the consent of the Governor. Vacancies were filled by the selection of one from two names submitted by the Governor to the House. The House of Keys would seem to have been in its origin a judicial body, and this may explain its want of initiative in the disposal of revenue. The House of Keys Election Act of 1866[1] made its members representative. Six sheadings, corresponding to counties, return three members each, the town of Douglas returns three, and three other towns each return one[2]. The duration of the House is seven years, unless dissolved earlier by the Governor. House of Keys.

The Deemsters hold weekly courts of criminal jurisdiction, having power to give sentences extending to two years imprisonment. The Governor sitting with the two Deemsters and the Clerk of the Rolls forms a Court of Chancery, Exchequer, Common Law and Gaol Delivery. The Staff of Government, a Court of Appeal from inferior jurisdictions, is similarly constituted. Judicature.

The Island is subject to the legislative power of Parliament, but is not bound by Statutes unless specially named therein. The writ of Habeas Corpus runs in the Island, and an appeal lies from the decrees and judgments of the Governor to the Crown in Council.

§ 2. *The Channel Islands.*

There are two governments in the Channel Islands—Jersey, and Guernsey with its dependencies. The immediate

[1] Statutes of the Isle of Man, vol. iii, p. 372.

[2] The franchise is, in sheadings, an £8 ownership and £12 occupation qualification; in towns, a uniform £8 qualification.

link with the central executive consists in each case of a Lieutenant-Governor appointed by the Crown on the recommendation of the War Office after consultation with the Home Office. But the powers and duties of these officers are not so extensive as are those of the Lieutenant-Governor of the Isle of Man: the Islands possess legislative and judicial institutions of their own, and are very tenacious of their rights in respect of them.

Jersey.

The constitutional history of Jersey is not uninstructive, and may be briefly sketched.

History. With the other Islands it was a part of the Duchy of Normandy: it passed to the English Crown when the Duke of Normandy became King of England, and remained to the English Crown when Normandy was lost.

Constitutional development. The Island was governed by a Warden or Bailiff acting as representative of the King, and occupying very much the position of a Sheriff of an English county, but there seems no evidence of the existence of any popular or representative body corresponding to the County Court. Like the Sheriff his judicial powers were limited, and itinerant justices came from the King's Court to hold pleas of the Crown. In the reign of John a body described as *duodecim coronatores jurati* was entrusted with the custody of the pleas of the Crown, and with them the Bailiff was em-

The Court. powered to try certain suits relating to land. At some later dates these *jurats* were ordered to be chosen, for life, from among the inhabitants of the Island 'per ministres Domini Regis et optimates patriae,' and permitted to deal with cases of all sorts except treason, and assault upon the King's Officers.

This body, the Bailiff and jurats, acted not only as a Court, but as a local legislature making by-laws or ordinances in matters of domestic concern relating to markets, prices, police, and public health.

The Governor and Bailiff. In the reign of Henry VII the position of the Bailiff underwent a change: he had become a nominee of the

Captain or Governor of the Island. In fact, the chief executive office of the Norman times had become duplicated. The Warden or Governor was a great personage who entrusted the civil government to a deputy, the Bailiff. These offices were now placed on a more equal footing; both were nominated by the King, the Bailiff was at the head of the local government, the Governor was confined to military and political functions, and represented the external power of the Crown. For the purpose of making Ordinances the Bailiff and jurats from time to time summoned to their assistance *the States*, consisting of the rectors and constables of each parish. The constables were chosen by the parishioners, and the two bodies would correspond to the estates of the Clergy and the Commons in England.

The States.

In due time the States made the inevitable claim to be consulted, not at the pleasure of the Royal Court, but of right; and in 1771 a code of laws for the Island was confirmed by Order in Council [1], and it was laid down that no laws or ordinances should be passed, either provisionally or with the intention that they should receive the assent of the Crown in Council, unless by the whole Assembly of the States of the Island.

The Code of 1771.

We may now therefore consider the composition and powers of this Assembly of the States.

Composition of Assembly.

First there are the nominees of the Crown. The Lieutenant-or Deputy-Governor has a right of veto, but no vote. The Bailiff, who presides, has a casting vote, but no other. The Attorney- and Solicitor-General have a right to be present, and to take part in debate, but have no vote. The *Visconte*, who discharges the executive functions of Sheriff and Coroner, has a seat, but no right to speak or vote [2].

Crown nominees.

Next come the members of the Royal Court, the twelve jurats elected for life by the ratepayers of the Island. They must be native islanders, must possess real property of £720 in value, and are prohibited from the exercise of certain trades.

Royal Court.

Last come the States:—the twelve rectors of the parishes, appointed for life, and holding their seats *ex officio*; the

States.

[1] March 28, 1771.

[2] Order in Council, March 19, 1824.

twelve constables of the parishes, holding their seats *ex officio* and their offices for three years from the date of election[1]: the fourteen deputies, three for the parish of St. Helier, and one for each of the others. For these a triennial election is held in the month of December.

Legislative powers.

The legislative powers of the States are limited. Permanent legislation needs the assent of the Crown in Council. Provisional Ordinances may be made for local or immediate purposes, and these do not require to be expressly allowed. They do not remain in force for more than three years, but they may be renewed.

Veto and Dissent.

But all legislation, permanent or temporary, is subject to the *veto* of the Governor, or the *dissent* of the Bailiff[2]. The *veto* at once brings the proposed measure to nought. The *dissent* corresponds to the reservation of a Colonial Act by the Governor of a colony. It suspends the operation of measures until the King in Council has considered and allowed them.

Taxing powers.

The taxing powers of the States are also limited. The *hereditary revenues* of the Crown are collected by a Receiver General, and applied to official salaries and other purposes connected with the government of the Island. *The general levies*, taxes falling on property, need the sanction of the Crown, unless the money is needed for special and sudden emergency. The *impôts* or duties on wine and spirits are levied under the authority of letters patent of Charles II, which provide for their application to specified local purposes.

Imperial Statutes.

The islanders have claimed that neither Act of Parliament nor Order in Council is of force in the Island unless passed with the concurrence of the States. As regards Parliament, the claim, if seriously made at all, is made with reference to domestic as opposed to Imperial legislation: and Parliament would probably be unwilling to legislate on the domestic affairs of the Island without the good will

[1] The constables are chosen by the *principaux* of their respective parishes; these are parishioners owning property of the annual value of £160 and upwards.

[2] Order in Council, June 2, 1786.

of the States. For this reason the wretched judicial system of the Island remains unreformed. Acts of Parliament which affect the Island are transmitted thither by Order in Council, which directs that they should be registered and published; but this registration in no way adds to the binding force of the Statute.

Orders in Council.

There is a more grave dispute as to the right of the Crown to legislate by Order in Council without the concurrence of the States. It is maintained that no Order in Council may be put in force until it has been presented to the Royal Court for registration; that such registration may be suspended if the Order infringes the ancient laws and privileges of the Island [1]: and further that the making of an Order in Council without the concurrence of the States is an infringement of these privileges.

I will not pronounce upon a question which a Committee of the Privy Council have recently evaded [2]. It is sufficient to say that the rights of the Crown are asserted, and that they are contested except as regards the exercise of the prerogative of mercy [3].

Judicature.

The Royal Court which gradually became not merely a Court of Justice, but a local legislature, and was later compelled to share its legislative powers with the States, is still the Island judicature. The Bailiff and jurats are the

[1] These words are the substance of an Order in Council of May 21, 1679. This was repealed by an Order of December 17, 1679, to the effect that no Orders, save those which related to the public justice of the Island, needed registration for their enforcement. It is alleged that the Code of 1771 repealed the December Order and re-enacted the May Order. Even if this were so—and it seems open to doubt—the States would have to show that the ancient laws and privileges of the Island were infringed by legislation by Order in Council.

[2] The question came before the Committee of the Privy Council in 1894. An Order in Council had been made in 1891, regulating the Chairmanship of the Prison Board for Jersey. The States declined to register this Order and asked that it might be recalled, alleging among other reasons, that the Crown had no power to legislate for the Island without the consent of the States. The Committee of the Privy Council found other grounds for advising the Queen to comply with the wishes of the States. For the purposes of the argument a mass of information was collected, to which, by the kindness of the Right Honourable James Bryce, I have had the opportunity of referring.

[3] *In re* Daniel. Order in Council, January 12, 1891.

judges, but the jurats who are elected as members of the legislature do not necessarily know the law; being unpaid, they are under no obligation to learn it, and being elected for life, they are independent of criticism. The Bailiff, who is appointed by the Crown, is always a qualified lawyer, and receives an income from fees and direct payment of £720; but his opinion is of less weight than that of the ordinary jurat. He has no vote upon a judicial decision unless the jurats are equally divided: it has even been doubted whether, except under these circumstances, he may express an opinion.

The Courts.

The Court, thus constituted, sits either as a Court of first instance, when it consists of the Bailiff and two or three jurats, the *nombre inferieur*; or as a Court of Appeal, the Bailiff and seven jurats, the *nombre superieur*.

The Executive.

The Executive in Jersey is appointed, paid by, and responsible to the Crown. The Lieutenant-Governor directly represents the Crown for all military purposes, and for the exercise of the veto upon legislation. He is the medium of communication between the Island and the Home Government. In his military capacity he is responsible to the War Office; for other purposes to the Home Office.

Guernsey.

Guernsey.

The Bailiwick of Guernsey includes the adjacent Islands. The constitution of these differs only in details from that of Jersey. A Lieutenant-Governor represents the Crown here as in Jersey. The Royal Court, or *Chefs Plaids*, consisting of the Bailiff and twelve jurats, exercises legislative and judicial functions. It claims in its legislative capacity at certain sessions to make regulations called *Ordonnances*, which are of force in so far as they do not conflict with an Order in Council, or law emanating from a higher authority. These *Ordonnances* are in theory limited to regulations for the better enforcement of existing law. If they go further they need the assent of the Crown in Council. The Royal Court also formulates legislation which is submitted to the States: if approved by the States the proposed enactment

The Royal Court.

is submitted to the Crown in Council, and if there confirmed becomes law[1].

The States are representative of the entire community: they consist of two bodies: the larger, for the purpose of electing the jurats, a smaller one for purposes of legislation.

The larger body, the États d'élection, consists of the Bailiff and jurats, the rectors of eight parishes, the *douzeniers*[2], elected for life by the ratepayers of the eight parishes from among those who have served the office of constable. The number of *douzeniers* sent by each parish varies, but the total number is 180. These, with twenty constables elected by the ratepayers for three years, make up the États d'élection. The *États d'élection.*

The États de déliberation is a smaller body. The *douzeniers* of each parish, with the constable, form a parish council, and these attend personally at the États d'élection, but by deputies at the États de déliberation; the number of deputies is thus reduced to six from the town parish and its adjoining cantons, and nine from the county parishes. The *États de déliberation.*

The États de déliberation may tax within limits, and approve or reject legislation submitted to them from the *Chefs Plaids.* Their taxation, if it exceed certain limits, and their legislation in any event, needs the approval of the Crown in Council.

The Court of Guernsey, like that of Jersey, consists of the Bailiff and not less than two of the twelve jurats, an unskilled and unpaid body of men, appointed by popular election, for legislative rather than for judicial purposes. It exercises a criminal jurisdiction throughout the Bailiwick, and an appellate jurisdiction from the Court of Alderney. Judicature.

Alderney has its Court, its States, and its Executive, but the States of Guernsey may legislate for Alderney, subject to disallowance by the King in Council, and an appeal lies Alderney.

[1] Second Report on the State of the Criminal Law in the Channel Islands, Guernsey, 1847-8, pp. xi–xv.

[2] The *douzaine* is the parish council which provides for the relief of the poor, and the repair of roads, and makes the parochial rates.

from the Court of Alderney to the Court of Guernsey, subject to an appeal to the Judicial Committee of the Privy Council.

Sark has a similar Court with limited criminal jurisdiction.

The Church.

The Channel Islands are in the diocese of Winchester; there are twelve rectories in Jersey, eight in Guernsey, and a perpetual curacy of Alderney, all in the gift of the Crown on the recommendation of the Secretary of State. The Deans of Jersey and of Guernsey hold rectories in their respective Islands.

Section III

The Colonies

§ 1. *The Colonial Office*

The earliest colonies were acquired by conquest or discovery, and in the latter case were often regulated by a charter granted to a company or an individual. Their connexion with the central government was through the King in Council.

The Board of Trade and Plantations.

At the Restoration the affairs of the colonies were entrusted to a Committee of the Privy Council, and very shortly after to a Commission created by letters patent. This body was in 1672 combined with the Council for Trade, but in 1675 the commission was revoked, and the Privy Council resumed the management of colonial business. In 1695 the Commission of 1672 was revived as the Board of Trade and Plantations, but its powers were limited: its duty was to collect information, to report to the King in Council, and to give advice when required. The executive work was done by the Secretary of State for the Southern Department. The Board coexisted from 1768 to 1782 with a third Secretary of State for the Colonies. In 1782 the Board and the third Secretaryship were abolished [1]. Communications from the colonies were

[1] 22 Geo. III, c. 82.

to be addressed to the Privy Council, the executive business was transacted through the Home Office, and in 1786 a Committee of the Privy Council was constituted for Trade and Foreign Plantations. This Committee has passed into the Board of Trade[1]. In 1794 a third Secretary of State was appointed, mainly for the purposes of War, but in 1801 he was definitely described as Secretary of State for War and the Colonies. Through him was exercised the royal prerogative in respect of the colonies; and in 1854 he was relieved of his duties in the department of war. The Committee of Trade and Foreign Plantations still exists concealed behind the President of the Board of Trade; and a Secretary of State with a Parliamentary Under-Secretary and a large permanent staff now constitutes the Colonial Office.

The Colonial Secretary.

But the Colonial Office is now responsible for the government of British possessions which are not colonies. Outside the United Kingdom, and apart from the adjacent islands and British India, the dominions and dependencies of the Crown include colonies and protectorates. It is with these two last that we are here concerned.

Extent of his responsibility.

A Colony is defined by the Interpretation Act (1889) as 'any part of His Majesty's dominions exclusive of the British Islands and of British India[2].'

A Colony.

'Colony' then is a geographical, not a political term: it does not imply any form of government, nor is it precisely coextensive with the functions of the Colonial Office. Ascension, for instance, falls under the definition of a colony, but it is governed by the Admiralty: the protectorates are not a part of the King's dominions, but they are now, with very few exceptions, administered through the Colonial Office.

A Protectorate is not defined in the Interpretation Act, but it may fairly be described as a specific area of territory, not within the British Dominions, over which the King exercises sovereign rights, mainly based upon the Foreign Jurisdiction Act[3].

A Protectorate.

[1] See above, Part I, p. 195.

[2] 52 & 53 Vict. c. 63, s. 18.

[3] 53 & 54 Vict. c. 37. As to the nature of a Protectorate, see post, pp. 90-3.

As regards the colonies, certain general principles should be borne in mind respecting them. The Crown in Parliament can legislate for all and every one of the colonies, while the Crown in Council can also legislate for some. The Crown has a veto on all colonial legislation. The Crown is represented in every colony by an officer at the head of the executive government, usually called *the Governor*[1], and thus exercises a control varying in extent and character over the composition of the executive in every colony.

Crown colonies and self-governing colonies.

The colonies may be divided into two groups: the self-governing colonies, or those which possess responsible government, and the Crown colonies. We may put aside for the present the self-governing colonies.

The forms of government employed for Crown colonies and protectorates are largely the same, and they are dealt with by the same department of the central executive[2]: we may therefore deal with them together.

§ 2. *Crown Colonies and Protectorates.*

Colony as distinguished from Protectorate.

Before touching on these forms of government we should note the distinguishing characteristics of a colony and a protectorate.

First, a colony is British territory, a protectorate is not. Hence it follows that a man born in a British colony is a British citizen; a man born in a protectorate is *prima facie* an alien.

And secondly, a colony is only under certain conditions subject to legislation by the Crown in Council. A protectorate is always and necessarily so subject, because the powers possessed in respect of it are based on the Foreign Jurisdiction Act, which only comes into operation by Order in Council.

Legislation by Order in Council.

The right of the Crown to legislate thus in respect of colonies may originate in various ways.

[1] Sometimes Governor-General, Commissioner, or High Commissioner.

[2] This general statement needs to be qualified in the case of Zanzibar and of the governments of North Borneo and Sarawak, where the protectorates are under the Foreign Office, and of the Indian Protected States, whose relations are with the Secretary of State for India.

(1) A colony acquired by conquest or cession is by the common law prerogative of the Crown a subject for legislation by Order in Council. Under such an order the King can constitute the office of Governor by Letters Patent, and by the terms of these Letters, or by Instructions given to the Governor, can provide for the government of the colony. But this power does not exist in case of colonies acquired by settlement; and is lost when once representative institutions have been granted to a colony. Conquest or Cession.

(2) The British Settlements Act (1887) affects all new settlements where there is no existing civilized government, and certain settlements of older date, namely, the Falkland Islands, and the colonies established on the West Coast of Africa. Settlement.

By this Act Queen Victoria was empowered—

'To establish such laws and institutions, and to constitute such courts and officers, and make such provisions and regulations for the proceedings in the said courts, and for the administration of justice as may appear to Her Majesty in Council to be necessary to the peace, order, and good government of Her Majesty's subjects and others within any British settlement [1].'

These powers may be delegated in certain forms and subject to certain restrictions to any three or more persons within the settlement, but the right to legislate by Order in Council is reserved.

(3) Statutes have dealt with the government of individual colonies, but in different ways. The government of the Straits Settlements was separated from that of India by an Act of 1866 [2], and powers corresponding to those of the British Settlements Act were conferred upon the Crown for the government of the newly constituted colony. Other colonies possessing constitutions with representative legislatures have by local Acts surrendered these constitutions and requested the Crown to make such provision for their government as might seem desirable. Statute.

This surrender has been confirmed by an Imperial Statute

[1] 50 & 51 Vict. c. 54.

[2] 29 & 30 Vict. c. 125.

and the Crown has thereupon framed constitutions by Letters Patent, reserving the right to legislate further by Order in Council if need be. This was the case with Grenada, St. Vincent, and Tobago in 1876[1]. Tobago some years later was taken out of this group of the Windward Islands and united in government with Trinidad by Order in Council made under 50 & 51 Vict. c. 44.

Surrender of colonial rights.

(4) Honduras, a colony acquired by settlement, by a local Act passed in 1870 abolished its Legislative Assembly and substituted therefor a Legislative Council, nominated by the Crown. This local Act received the assent of the Crown in Council, but no further powers of legislation by Order in Council are reserved to the Crown.

Protectorate.

The right of the Crown to legislate by Order in Council for a protectorate rests on the Foreign Jurisdiction Act of 1890[2], which consolidated previous existing Statutes on the subject. It might, in fact, be said that the protectorate in its most complete form is evolved from a broad construction of the earlier sections of that Act. The Act begins by reciting that 'by treaty, capitulation, grant, usage, sufferance, and other lawful means Her Majesty the Queen has jurisdiction within divers foreign countries,' and goes on to enact that the Crown may lawfully—

Source of power of Crown.

The Foreign Jurisdiction Act.

'Hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country, in the same and as ample a manner as if Her Majesty had acquired the jurisdiction by the *conquest or cession of territory*.'

And the second section makes provision for the case of a country not possessing a government from which such jurisdiction could be obtained in any of the methods above recited, enacting that there shall be the same jurisdiction over subjects of the Crown resident in or resorting to that country.

This jurisdiction was originally applicable to cases arising between British subjects, or between British subjects and

[1] 39 & 40 Vict. c. 47. [2] 53 & 54 Vict. c. 37.

foreigners, acquiescent in the jurisdiction, in independent States where jurisdiction had been obtained in the manner recited in the Act: and it was brought into use by Order in Council.

Modes of origin of protectorate.

Its extension to protectorates calls attention to the modes in which a protectorate may come into existence. A protectorate may be constituted by treaty with a foreign power which exercises an independent government. Such a power may place its foreign relations under the control of the British Government and administer its internal affairs under the guidance of a British resident, to the extent provided for in the agreement. The States of the Malay Peninsula and the Sultanate of Brunei are illustrations of this kind of protectorate; so is Zanzibar, though this last remains under the Foreign Office.

On the other hand a protectorate may be established over territories owned by a number of tribal chiefs, where civilization, if it can be said to exist at all, is in a backward state, and where land, or the use and occupation of land, has been ceded on a large scale to the Crown, or to a company which has been superseded by the Crown, or which continues to govern under the supervision of the Foreign Office [1]. Such a protectorate is hardly distinguishable from the sovereignty which arises from conquest or settlement. Where a protectorate of this kind is constituted in territory which other European powers have agreed to regard as a British sphere of influence, it would seem impossible for any power to contest the right of the Crown to establish jurisdiction over all persons resident within the protected area. The protectorates throughout South Africa are of this character, and the Orders in Council upon which they rest proceed on a very liberal construction of the Foreign Jurisdiction Act [2]. They empower the High Commissioner 'by proclamation to provide for the administration of justice, the raising of revenue, and generally for the peace,

[1] The Royal Niger Company is an instance of a company whose rights and powers have been transferred to the Crown; while the British South Africa Company continues to govern in Rhodesia under conditions laid down in Orders in Council.

[2] Post, p. 93.

good order, and good government of all persons within the limits of this Order.'

Common features of colony and protectorate.

Although colony and protectorate differ thus in origin and in character, the same forms of government are used for both; and not only are the same forms used but the same government may include a colony and a protectorate. Thus the colony of Labuan, which until 1906 had a Governor of its own, is now administered, together with the protectorate over Brunei, by the Government of the Straits Settlements: the colony of Lagos is merged, for purposes of government, in the protectorate of Southern Nigeria; the Western Pacific Commission includes an island which is a colony by settlement, groups which by convention with Germany have been recognized as under British protection, other groups which we have taken under our protection without reference to other powers, and yet another group, the New Hebrides, in which we exercise a joint control with the Government of the French Republic.

Forms of Crown Colony government.

The feature common to all the forms of government in use for the Crown colonies and protectorates is the irresponsibility of the executive to a representation, in any form, of the people of the colony.

These forms of constitution range from government by a single executive officer, unassisted even by an official Council, to the combination of an elected representative Assembly with a nominated Legislative Council, and a Governor, representing the Crown, assisted by an Executive Council—a counterpart, but only in form, of the Constitution of the United Kingdom. The resemblance fails because this Executive Council is not responsible to the representative Assembly: its members are nominated by the Secretary of State at Whitehall, or subject to his approval. If they differ, on matters of policy, with the Assembly, there may be a difficulty about supplies. A deadlock may arise, for which the constitution provides no means of settlement.

This last type of constitution, which now only survives in the Bahamas, Bermuda, and Barbadoes, was at one time

the commonest form of colonial government. In the older colonies, where it existed, the possibilities of friction have been removed, either by the grant of responsible government or by the surrender of the original constitution and the acceptance of one which increases the power of the executive, and, in most cases, restores the right of the Crown to legislate by Order in Council [1].

The forms of constitution applicable alike to Crown colonies and protectorates fall into definite groups:—

Government with no legislature.

A. Some are administered by a Governor or Commissioner without a Legislative Council; and sometimes in subordination to a High Commissioner or to a more fully organized colonial government.

Thus Ashanti and the Northern Territories of the Gold Coast are administered by a resident Commissioner under the Government of the Gold Coast Colony.

Basutoland, Bechuanaland, and Swaziland are administered by resident Commissioners under the High Commissioner for South Africa, and the Western Pacific Islands by a High Commissioner, who is also Governor of Fiji.

Northern Nigeria is under a High Commissioner; Uganda, Weihaiwei [2], and Somaliland are under Commissioners; St. Helena has a Governor and an Executive Council; Gibraltar has a Governor, but no Council.

Three protectorates (the Gambia, Sierra Leone, and Southern Nigeria) are administered respectively by the governments of the colonies of the same name. They are, in fact, the *hinterlands* of their several colonies.

Government with nominated legislature.

B. The next form of colonial government is by a Governor and a Legislative Council, wholly nominated by the Crown. On this Legislative Council are placed the executive officers, who constitute a majority of the Council. The

[1] The grant of a representative assembly determines the right of the Crown to legislate by Order in Council. *Campbell* v. *Hall*, 20 State Trials, p. 329. The colonies in which this right has not been restored on the surrender and recasting of the constitution are Honduras and the Leeward Islands.

[2] Weihaiwei is held on lease from China.

Governor initiates and the official majority controls the legislation of the colony: in most cases there is an Executive as well as a Legislative Council. This form of government is used for protectorates as well as for colonies, as may be seen from the following list:—

British Honduras.	Nyassaland Protectorate.
Ceylon.	St. Lucia.
East Africa Protectorate.	St. Vincent.
The Falkland Islands.	The Seychelles.
Gambia.	Sierra Leone.
The Gold Coast.	Southern Nigeria.
Grenada.	Straits Settlements.
Hong Kong[1].	Trinidad and Tobago.

The constitutions of all these colonies have been framed or approved by the Crown in Council. Three at one time possessed representative assemblies, Honduras, Grenada, and St. Vincent. These have been surrendered by Acts of the local legislatures, confirmed in the case of the two islands by imperial Statute[2], in the case of Honduras by Order in Council.

The majority of this group are administered by a Governor with an Executive, and also with a Legislative Council. The Executive Council is wanting in the three Windward Islands, Grenada, St. Lucia, and St. Vincent, in the Seychelles, and in Nyassaland.

Colonies with partly elected legislative council.

C. The next group of colonies possess Legislative Councils, some of whose members are elected; but the constitution is careful to provide that these elected members should be in a minority. These are Fiji, Jamaica, the Leeward Islands, Malta, Mauritius.

The Governor of Fiji is also High Commissioner for the Western Pacific Islands. The Seychelles Islands were at one time administered from Mauritius, and the Turk's and Caicos Islands are now subordinate to the Government of Jamaica.

[1] Hong Kong includes the district of Kowloon, held on lease for a term of 99 years from China.

[2] 39 & 40 Vict. c. 47.

This group of colonies furnishes several instances of the surrender and exchange of representative institutions for the Crown colony form of government. The individual members of the Leeward Islands, federated since 1871, by an imperial Statute gave up their old elected assemblies [1], but are not subject to legislation by the Crown in Council.

Jamaica. Jamaica, which enjoyed a full counterpart of British institutions, a Governor, a Privy Council, a nominated Legislative Council, and an elected assembly, gave up this constitution by local Act in 1866, and is now ruled by a Governor, an Executive Council—still called a Privy Council—and a Legislative Council, of whom a minority are elected.

British Guiana. British Guiana and Cyprus possess Councils in which the elected members are in a majority. In British Guiana the Court of Policy or Legislative Council consists of the Governor, seven official and eight elected members; but the imposition of taxes, audit of accounts, and discussion of estimates is the work of the Combined Court, which consists of the Court of Policy and six financial representatives chosen on the same qualifications and under the same franchise as the elected members of the Court of Policy.

Cyprus, of which Great Britain enjoys the use and occupation on certain terms, for an undefined period, is governed, under the provisions of Orders in Council, by a High Commissioner with an Executive and a Legislative Council: the latter contains six nominated and twelve elected members.

Colonies with representative but not responsible government. D. There remains a group of three colonies which retain representative institutions without responsible government. These are Barbadoes, Bermuda, and the Bahamas. In each of these an attempt is made to bring executive and legislature together by the introduction into the executive of members of the representative Assembly [2]. In each we find a popularly elected Assembly, a nominated Legislative

[1] 34 & 35 Vict. c. 107.

[2] In Bermuda two places are reserved for unofficial members on the Executive Council, and are filled by two members of the Assembly. In the Bahamas the proportion is larger.

Council, a Governor, and an Executive Council not responsible to the electorate though containing some of its representatives. In Barbadoes we get the nearest approach to a Cabinet in the Executive Committee, a body distinct from the nominated Executive Council. This committee contains four members of the Assembly, chosen by the Governor: it prepares estimates, introduces money votes, and has the initiative in legislation as well as in taxation.

These three colonies represent a survival: it seems plain, not merely from the action of the colonies which have surrendered their constitutions, but from the recent cases of the Transvaal and Orange River Colonies, that experience approves two types of government and two only, the Crown colony and the self-governing colony.

§ 3. *The Self-governing Colonies.*

Meaning of responsible government.

The last group of colonies to be dealt with is that of the self-governing colonies or the colonies which possess responsible government. This means that the colony is administered by men who can command the support of a majority in the colonial legislature, not by men who, as in a Crown colony, are chosen by the Governor, or by the Secretary of State at Whitehall, and hold office irrespectively of the opinions of the representative Assembly, where one exists.

The Executive.

The Executive in such a colony consists of the Governor, nominated by the Crown, and a body of officials nominated not by the Crown but by the Governor: technically holding office at the pleasure of the Governor, as at home the heads of departments hold office at the pleasure of the King; but actually dependent for their continuance in office on the support of a majority in the Colonial Parliament.

The Legislature.

The Legislature consists of two chambers, except in certain provinces of the Dominion of Canada[1]; one usually called the Legislative Council or Senate—sometimes nominated, sometimes elected—and a Legislative Assembly which,

[1] Quebec and Nova Scotia possess two chambers; in the other provinces the Legislative Council has either been abolished, or, in the newer provinces, has never been created.

under different names in different colonies, corresponds to our House of Commons. The self-governing colonies are Canada, Newfoundland, New Zealand, the Cape Colony, Natal, the Transvaal Colony, the Orange River Colony, and the six colonies—New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia—which make up the Australian Commonwealth. Of these the two great Federations, the Dominion of Canada and the Commonwealth of Australia, will need separate consideration.

Responsible government a gradual growth.

It must not be supposed that responsible government, as we understand it, sprang into existence, fully developed, in the colonies, any more than it did at home. Canada is the birthplace of colonial responsible government, and there we can trace the growth of its principal features—the acceptance by the Governor of the advice of his responsible ministers and the presence of those ministers in one or other house of the Legislature, their dependence upon a Parliamentary majority for their continuance in office, the permanent tenure of office by the civil servant, and his exclusion from the Legislature. These principles developed in Canada between the years 1840–1850, notably during the time that Earl Grey was Colonial Secretary[1].

Traces of it in Statute.

Statutory provision for these essential features, where it exists at all, is not easily found. In a clause in the Act of the Victorian Parliament which formulated the existing constitution we find one such feature.

Victoria.

'§ 37. The appointments to public offices under the Government of Victoria, hereafter to become vacant or to be created, whether such offices be salaried or not, shall be vested in the Governor, with the advice of the Executive Council, *with the exception of the officers liable to retire from office on political grounds*, which appointments shall be vested in the Governor alone[2].'

The introduction into the Victorian Statute of a rule which is merely a convention of the English constitution is

[1] Egerton and Grant, Canadian Constitutional Development. Chapters on 'Responsible Government,' particularly pp. 307, 308 and 311, 312.

[2] The Act is in the Schedule of 18 & 19 Vict. c. 55.

of itself a curious illustration of the way in which custom crystallizes into law. But it must be confessed that to one who did not know the custom the words would be obscure. An officer liable to retire 'on political grounds' is a departmental chief or member of the Cabinet who goes out of office when his party has ceased to be in a majority in the elected legislature. The Act which made ministers in Cape Colony responsible to its Parliament recites as its object 'the introduction of the system of executive administration commonly called responsible government[1].' But nothing in the Act explains the phrase.

Cape Colony.

The convention, based on necessary convenience, which requires ministers to occupy seats in one or other house of the Legislature finds statutory expression in several of the colonial constitutions. In Western Australia one of the five holders of the executive offices *liable to be vacated on political grounds* must be a member of the Legislative Council. In Natal and in the Commonwealth of Australia[2] ministers must possess, or within a limited time obtain, seats in one or other chamber on pain of losing office. In South Australia we find that a minister may be liable to loss of office if *unable to become a member, or to obtain the support of a majority*[3] of the Parliament.

Australia and Natal.

Responsible government then, though some of its features have crept into colonial statutes, rests largely in the colonies, as here, upon convention. The basis of the constitutions of these colonies is either Imperial Statute, Local Statute confirmed by Order in Council, or Letters Patent. We may briefly note the main features of this form of colonial government.

The Governor stands at the head of the colonial executive, he is, for all the ordinary purposes of government, the constitutional sovereign. He summons, prorogues, dissolves the colonial legislative bodies; he exercises the prerogative

The Governor as a colonial head of State:

[1] Cape of Good Hope Statutes, No. 1 of 1872, vol. ii, p. 1191.

[2] Commonwealth of Australia Constitution Act, 63 & 64 Vict. c. 12, s. 9, sub-s. 64. 'After the first general election no Minister of State shall hold office for a longer term than three months unless he is or becomes a senator or a member of the House of Representatives.'

[3] South of Australia Statutes, No. 2 of 1855-6, s. 39.

of pardon; where the second chamber is nominated and not elective, he summons to the Legislative Council such persons as he and the Executive Council think fit; his assent to bills is necessary to their validity, but in most respects he acts, and is supposed to act, like the sovereign of these realms, on the advice of his ministers.

as an Imperial Officer.

But the Governor stands to the Imperial Government as an officer of the Crown. His office is constituted and defined by Letters Patent; he acts under a Commission, and subject to Instructions which further define his powers. There are occasions when he cannot reconcile the two characters in which he is required to act, and the difficulties which thence arise must be dealt with presently.

Council and Cabinet.

The Executive Council is in most cases coextensive with a group of departmental chiefs changing with the rise and fall of party majorities. Sometimes, as in the Dominion of Canada, the Commonwealth of Australia, and the Colony of Victoria, the cabinet or group of departmental chiefs on leaving office remain members of the Executive Council, though they only attend its meetings for the transaction of formal business or to advise on non-political questions. In other words, in certain forms of colonial government we find both a Cabinet and also a Privy Council: in others the Cabinet does duty for both.

The Legislative Council.

The Legislative Council or Senate consists of persons nominated by the Governor in eight of the self-governing colonies—Canada, Newfoundland, New South Wales, New Zealand, Queensland, Natal, the Transvaal, and the Orange River Colony. In the rest, including the Commonwealth of Australia, the Legislative Council or Senate is elected, but on different conditions, either of franchise or tenure, to that of the other House.

Among the Canadian provincial governments Quebec and Nova Scotia alone are bicameral. The other provinces have either abolished their second chamber or have never possessed one.

The Lower House[1] in a self-governing colony is usually

[1] The title of the Lower House in the various colonies is worth noticing. In the Dominion of Canada it is the House of Commons, in

The Legislative Assembly.

chosen on a wide franchise[1]. Its natural term of existence is uniformly shorter than that of the Legislative Council, where the latter is subject to dissolution, varying from three to five years. Payment of members is almost universal. Two conventions of the Imperial Parliament are embodied in Statute, or observed in practice. The rule that money bills must originate in a recommendation from the representative of the Crown is based on Statute and not on standing order or convention; and in some form or other the initiative and control of the Lower House over such Bills is established.

Colonial Federation.

It remains to consider the two great Federations of self-governing colonies, the Dominion of Canada and the Commonwealth of Australia.

The federation of the Canadian colonies is provided for under the British North America Act of 1867. The Australian Commonwealth Constitution Act of 1900 contains the terms of Australian federal government.

The Dominion of Canada.

The history of the movement towards federation would not be in place here. It is enough to say that the British North America Act provided for the immediate federation of Canada, Nova Scotia, and New Brunswick, for the division of Canada into the two provinces of Ontario and Quebec, and for the admission of the rest of British North America into the scheme of Federal Government. Under this Act Manitoba was introduced in 1870, when the North-West Territories were acquired from the Hudson's Bay Company, British Columbia joined in 1871, Prince Edward Island in 1873, and the new provinces of Alberta and Saskatchewan were created out of the North-West Territories in 1905. The residue of those territories is administered by a Commissioner under the Colonial Government.

The Commonwealth of Australia.

In Australia the entire group of self-governing colonies came at once into the federal system, but the isolation of

the Commonwealth of Australia and the Dominion of New Zealand it is the House of Representatives, in Cape Colony, Newfoundland, South Australia, and Tasmania, the House of Assembly, elsewhere the Legislative Assembly.

[1] The franchise is extended to women in New Zealand, Queensland, New South Wales, South Australia, and Western Australia.

Australia in respect of other countries and the complete development of responsible government in all the federating colonies have brought about some contrasts which it is proper to note.

Similarities.

In each we have a Governor-General, representing the Crown in the Federal Government, and Governors of the Provinces or States which form the federation. In each we have a central legislature, and state or provincial legislatures. In each we have a supreme court capable of determining questions which may arise between the central or Federal Government and Parliament, and the Governments or Parliaments of the States which constitute the Federation.

Contrasts.

The Provinces and States.

But the two constitutions differ in some conspicuous features. The Provinces of the Canadian Federation are much more intimately connected with the central Federal Government than are the States in the Australian Commonwealth, and for this reason. The States are self-governing colonies. The Provinces sacrificed many of the rights of a self-governing colony for the sake of a more intimate union. This difference appears in various ways.

The two Senates.

The Senate of the Dominion is nominated by the Governor-General, and its members hold their seats for life. The Australian Senate is elected, six members from each State, for a term of six years. The Canadian Senate is also constituted so as to secure a representation of each Province, but whereas in Australia each State sends the same number of representatives to the Senate, in Canada the amount of representation is proportioned to the population of each province.

Provincial and State Governors.

Again, the Lieutenant-Governors of the Canadian Provinces are appointed and can be dismissed by the Governor-General; the Governors of the Australian States are appointed by the Crown.

Legislation by Provinces:

The legislation of the Canadian Provinces is subject to the veto of the Governor-General, and this veto, as it would seem, must be exercised on the advice of his responsible ministers by the Governor-General in Council [1],

[1] See 30 & 31 Vict. c. 3, ss. 55, 56, 57, 90, and Todd Parl. Govt. in Colonies, ch. xv, pp. 448–56.

and not by the Governor-General as an imperial officer exercising a discretion in the interests of the home and colonial governments. It would follow from this view of the matter that the Bill of a provincial legislature could not go beyond the Governor-General or be submitted to the Secretary of State for confirmation or disallowance. If the measure is inexpedient, the Governor-General must nevertheless affirm it if his responsible ministers so advise him. If when so affirmed it is alleged to be beyond the powers of the provincial legislature, the matter may come before the Courts and so, ultimately, before the Judicial Committee of the Privy Council.

and by States.

The legislation of an Australian State does not come before the Government of the Commonwealth; if affirmed or reserved by the Governor of the State it passes at once to the Colonial Office for the consideration of the Secretary of State.

Relations of State and Federal Legislatures

And this points to a very marked difference between the legislative powers of the Australian States and the Canadian Provinces, and of their Federal Legislatures.

in Australia:

The Parliaments of the Australian States have unrestricted powers of legislation; the Commonwealth Parliament is confined to certain subjects which concern the Commonwealth as a whole [1]; but if a State Parliament should legislate on a subject assigned to the Commonwealth Parliament, and should legislate in a sense repugnant to that of the Federal Legislature, the latter would prevail [2].

in Canada.

In Canada certain subjects are assigned to the Dominion Parliament and certain other subjects to the Parliaments of the Provinces [3], and the legislative powers thus concerned are mutually exclusive. Certain subjects occupy an intermediate ground and are common to both [4], but in case of a conflict of law the Dominion Statute prevails.

The local and domestic character of the subjects assigned to the provincial legislatures may explain the abolition of the second chamber in all but two of the provinces.

[1] 63 & 64 Vict. c. 12, s. 51.
[2] 63 & 64 Vict. c. 12, s. 109.
[3] 30 & 31 Vict. ss. 91, 92.
[4] Ibid. s. 95.

Constituent powers.

It remains to note that the Dominion Parliament possesses very limited power to alter the Federal Constitution, while the powers conferred on the Commonwealth Parliament, though quite general, must be exercised subject to provisions which secure the submission of the proposed change, by *referendum* to the entire electorate [1].

The Commonwealth constitution does not only provide against hasty changes in the constitution, but against unconsidered legislation of any sort, by means of elaborate arrangements for the settlement of a disagreement between the two Houses [2].

§ 4. *General Principles of Colonial Government.*

The relations of the colonies to the Crown have been indicated as they came under consideration in respect of the various types of colonial constitution in the foregoing pages, but they need more consecutive and somewhat fuller treatment.

The colonies, however complete may be their general measure of self-government, are a part of the British Empire, and are dependent upon it.

This dependence appears, first, in the veto upon all colonial legislation, which may be exercised either through the Governor of a colony as representing the Crown, or by the Crown in Council. A Bill which has passed the two chambers of a colonial Legislature must go before the Governor for rejection, reservation, or assent. He may exercise his veto, and the Bill is then lost. He may reserve the Bill for the ascertainment of His Majesty's pleasure, and he may do this either because there is something exceptional in the nature of the Bill, or because it is one of a kind which, by the terms of the colonial constitution or of his Instructions [3], he is bound to reserve: the Bill

[1] 63 & 64 Vict. c. 12, s. 128. [2] Ibid. s. 57.

[3] If the matters for reservation are only set forth in the Instructions, and the Governor neglect to observe them, and so give his consent to a Bill which should have been reserved, the law will not on that account be inoperative. Colonial Laws Validity Act, 28 & 29 Vict. c. 63, s. 4.

in such cases remains inoperative until the pleasure of the Crown is expressed.

He may assent to the Bill, but even then it must be reported to the Secretary of State for the Colonies, who may within two years from its communication advise the King to disallow it. In such cases the King's pleasure is signified to a self-governing colony by Order in Council, to a Crown colony by dispatch: but disallowance is of rare occurrence, and would only take place where imperial interests are involved.

Legislation by King in Council.

Besides the universal power of veto upon legislation, the King in Council can legislate for certain colonies, and for all protectorates by Order in Council.

Restrictions: settled colonies,

This power is restricted, primarily, in respect of colonies to such as are acquired by conquest or cession; it does not extend to colonies acquired by settlement. The English settler carries with him into the land which becomes British territory by his settlement the law and the liberties of the British citizen. The Imperial Parliament alone can legislate for him. This rule, however, is applicable only to colonies thus acquired before the British Settlements Act of 1887, which dealt with certain existing colonies[1] and with any which might thereafter be acquired by settlement. For these the Crown may legislate by Order in Council, or may delegate the power of legislation to three or more persons within the colony. Apart from imperial legislation, or legislation under the above-named Act, the English settler takes with him the law of England as it stood at the date of settlement.

or where representative institutions granted.

Another restriction on the right of the Crown to legislate by Order in Council is to be found in the rule that when once a representative legislature is granted to a colony, that colony is subject only to legislation by its own assembly or by the Imperial Parliament.

Grenada was a Crown colony: the King could make laws and levy taxes. In October, 1763, he issued a proclamation promising to the colony a representative legislative

[1] 50 & 51 Vict. c. 54, which dealt specifically with the settlements on the West Coast of Africa and the Falkland Islands.

assembly. In April, 1764, he gave a commission to the Governor to summon such an assembly to make laws in the usual forms. In July, 1764, he issued Letters Patent imposing upon Grenada a duty, already imposed on the other Leeward Islands, of $4\frac{1}{2}$ per cent. on all exported goods in lieu of other customs or import duties. Campbell paid the duty and sued Hall, the collector, for the amount. Lord Mansfield in giving judgment for the plaintiff said :—

Lord Mansfield in *Campbell* v. *Hall.*

'We think that by the two proclamations and the commission to Governor Melville, the King had immediately and irrevocably granted to all who did or should inhabit or who did or should have property in the island of Grenada—in short to all whom it might concern—that the subordinate legislature over the island should be exercised by the assembly in the same manner as the other provinces under the King.

'And therefore, though the right of the King to have levied taxes was good, and the duty reasonable, equitable and expedient; yet by the inadvertence of the King's servants in the order in which the several instruments passed the office (for the Patent of July, 1764, for raising the impost should have been first) the order is inverted, and the last we think contrary to and a violation of the first, and therefore void.

'How proper soever the thing may be respecting the object of these Letters Patent, it can only now be done by an Act of the assembly of the island or *by the Parliament of Great Britain*[1].'

Legislation by Parliament.

And thus we pass from the legislative powers of the Crown in Council to those of the Crown in Parliament. The powers of a Colonial Parliament are limited to its own territory: the Imperial Parliament can legislate for the whole of the King's dominions. But Parliament will not use this power for purposes of taxation, and rarely, and only where imperial interests are concerned, for legislation which would affect the internal affairs of a colony. The need of imperial legislation is found more especially in matters where colonial legislation is desired to operate outside the boundaries of the colony, and this can only be effected by the aid of the Imperial Parliament. In respect of matters

[1] *Campbell* v. *Hall*, 20 State Trials, p. 329.

such as merchant shipping, bankruptcy, extradition, crime committed on the high seas, coinage, and the like, imperial statutes either make provision, or come in aid of the colonial legislature [1].

The supremacy of the Imperial Parliament is indicated in the Colonial Laws Validity Act (1865), which provides that:—

'Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative [2].'

§ 5. *The Colonial Governor.*

The representative of the Sovereign:

The Governor of a colony represents the King. His office is constituted and his powers defined by *Letters Patent*; he is appointed by *Commission*; and the manner in which his duties are to be carried out is further set forth in *Instructions*.

his executive powers;

His principal executive powers are these.

He convokes and prorogues legislative assemblies, directs the issue of writs for the summons of such as are elected, and dissolves those which are liable to dissolution.

Bills passed by a colonial legislature come before him for assent, veto, or reservation.

his part in legislation;

In colonies which do not possess responsible government he initiates legislation: in the self-governing colonies a message from him is the foundation of any proposal for a grant of money, and he issues warrants for its expenditure [3].

[1] See Jenkyns, British Rule and Jurisdiction beyond Seas, pp. 26-31.

[2] 28 & 29 Vict. c. 63.

[3] The conflict which arose in Victoria in 1878 between the two Houses led to a difficulty as to the issue of public money without Parliamentary authority, a course pressed upon the Governor, Sir George Bowen, by his ministers, and successfully resisted by him until the two Houses came to a compromise and passed an appropriation Bill. Todd, Parl. Govt. in Colonies, pp. 723-30.

His prerogative of mercy;

He exercises the prerogative of pardon, but in a self-governing colony he does so on the advice of his ministers, and only assumes personal responsibility if the matter should affect interests outside the colony.

Appointment to office;

In Crown colonies he appoints to vacant offices, absolutely, or provisionally on the approval of the Crown, according to the tenor of his letters patent or instructions, or the terms of local law, and can suspend or dismiss the holders of office subject to regulations. In colonies which possess responsible government he can appoint or dismiss all public servants who hold at pleasure, and can appoint to all public offices, but in this he acts with the advice of his Council.

His powers in Crown colonies and

In the self-governing colonies the powers of the Governor are nominally wider than in the Crown colonies, where the duties of the Governor are precisely set forth in his instructions. But within the range of those instructions the Governor of a Crown colony acts with independence. He is given certain limited powers to use at his discretion.

In self-governing colonies.

The distinction is to be seen in the relation of ministers to the Governor: in a Crown colony ministers are responsible to the Governor, in a self-governing colony they are responsible to the electorate. Hence the Governor of a self-governing colony is a constitutional king; his discretion must be that of his responsible advisers; he may endeavour to influence them, but he must not act contrary to their final decision, unless Imperial interests are in issue or unless he is prepared to appeal from them to the colonial Parliament and ultimately to the colonial electorate.

An illustration of this principle was afforded in New Zealand in 1892. A Prime Minister with a large majority in the elected chamber had so few supporters in the nominated second chamber that he not only could not carry his measures, he could hardly obtain a discussion for them. There was no limit to the numbers of the upper chamber, and the Ministry asked the Governor to create a sufficient number of additional members to give them a majority. The Governor refused to create the full number for which his ministers asked, on the ground that the existing state

of parties was abnormal, and that the satisfaction of the demand would permanently alter the political character of the second chamber. On reference to the Colonial Office, however, he was instructed that, where no imperial interests were concerned, and where there was no reason for doubting that the constituencies were of one mind with his responsible ministers, he must follow their advice[1]. The difficulties which confront the Governor of a colony are sometimes due to a want of definite party divisions, or perhaps, more truly, to the existence of several parties, no one of which possesses a commanding majority. Political combinations become complicated when a group can hold the balance between two parties, and a nominated Legislative Council is not in accord with the ministers of the day. Demands may be made on one side for a creation of members of the Legislative Council to carry measures which may not have been fairly submitted to the constituencies, on the other side for a change of ministers and a dissolution which may ascertain the opinion of the country.

And these difficulties are perhaps increased because our self-governing colonies have come into a heritage of constitutional government which they have not earned. Like the children of a man who has painfully acquired a great fortune, they would spend without self-restraint; they wish to enjoy their liberties and are impatient of conventions. Yet in government, as in daily life, the observance of conventions is apt to smooth the path of every one.

But the Governor is not only a constitutional monarch for the purposes of the colony, he is an officer of the Crown who is bound to consider imperial interests where these come in conflict, as sometimes happens, with the policy or wishes of his colonial ministers. This may arise in the rejection or reservation of bills, in the exercise of the prerogative of pardon, in the use of the power of dissolution. On such occasions the position of the Governor, involving the discharge of a double duty to the King and to the colony, needs the employment of the utmost discretion.

[1] House of Commons Papers, 198 of 1893, p. 48. Until the end of 1891 members of the Council held their seats for life.

Legal liability,

The legal liability of the colonial Governor throws some light on the character of his office.

He can be sued in the Courts of the colony in the ordinary forms of procedure. Whether the cause of action spring from liabilities incurred by him in his private or in his public capacity, he enjoys no *prima facie* immunity. Though he represents the Crown, he has none of the legal irresponsibility of the Sovereign within the compass of his delegated and limited sovereignty [1].

for acts done as Governor,

More important are the questions which arise from time to time as to the limits of his liability, civil or criminal, whether in the colonial Courts or in the Courts of this country, for acts done in his capacity of Governor.

The first question to be answered is whether, apart from his position of Governor, *any* liability has arisen: this of course is a matter of general law, except in so far as the position of Governor may involve greater responsibility, and consequently justify more prompt measures for the repression of violence or disorder likely to lead to violence [2].

depends on his legal powers,

But assuming that a liability has been shown to exist, the next question to be answered is whether the acts complained of were done by the Governor of the colony *as Governor*; this is matter of fact; a further question follows, if so done, were they *acts of state*, that is, acts covered by the powers assigned to the Governor. It is not enough that the acts shall be such as the King, through his ministers, might lawfully do; it must be ascertained by reference to the letters patent and instructions with which the Governor of a Crown colony is furnished, or to the executive powers conferred by imperial or colonial law upon a Governor in a self-governing colony, whether the acts done are justified by the powers conferred [3]. If they are, the Governor is protected; he is a servant of the

[1] *Hill* v. *Bigge*, 3 Moore, P. C. 465. *Musgrave* v. *Pulido*, 5 App. Ca. 102. The Colonial Governor differs herein from the Lord-Lieutenant of Ireland, against whom no action can be maintained in Ireland while Viceroy of that kingdom for acts done in his official capacity. *Sullivan* v. *Spencer*, v. Irish Rep. C. L. 177.

[2] *Phillips* v. *Eyre*, L. R., 6 Q. B. pp. 15, 16.

[3] *Cameron* v. *Kyte*, 3 Knapp, 332.

not on his position as Governor.

Crown, doing that which the King might do by his servants, and has commissioned him to do if required. If the acts done are outside the powers conferred, the fact that the Governor assumed to do them *as Governor* will not protect him from their legal consequences [1].

We might speculate as to the legal position of the Governor of a self-governing colony, if on the advice of his responsible ministers he gave an order which the law would not support, and was sued by a person injured thereby. He does not seem to possess the legal irresponsibility of the Sovereign. Presumably he would refuse to act on the advice of his ministers unless the action recommended was so obviously desirable, and his ministers so clearly acting with the good will of the community, that they were certain to ensure the passing of an Act of Indemnity.

Section IV

India

§ 1. *The Emperor of India.*

The long history of the East India Company and its relations with the Crown and Parliament can have no place here. Students of that history will know or learn how a trading company with a temporary charter grew into a territorial sovereign subordinate to the English Crown and Parliament [2]: how the hold of the State upon

[1] *Musgrave* v. *Pulido*, 5 App. Ca. 111. 'Let it be granted that, for acts of power done by a Governor *under and within the limits of his commission*, he is protected, because in doing them he is a servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of State.'

It must be understood that 'acts of State' as between sovereign and subject must be acts such as the sovereign can lawfully do. If one should allege of an act complained of, that, though unlawful in itself, it is a matter of State policy or necessity, the answer is, in the words of Lord Camden, that 'the common law does not understand that kind of reasoning.' *Entick* v. *Carrington*, State Trials, 19, p. 1030.

[2] See the preamble to 53 Geo. III, c. 155, where territories of the Company are described as '*subject to the undoubted sovereignty* of the Crown.'

the Company and the control of its action became closer and closer as the charters came up for renewal from time to time: how after the Indian Mutiny the dual control of India was brought to an end, and the government of India was by Statute assigned to the Crown.

The King of the United Kingdom of Great Britain and Ireland and of the British dominions beyond the seas is Emperor of India[1].

The character of the Indian Government.

The title suggests, what is the case, that the government of India does not correspond in character to the government of the British dominions beyond the seas. From the executive point of view, and apart from the legislative supremacy of Parliament, the colonies are governed by the King in Council, acting on the advice of the Secretary of State for the Colonies. But India is governed by the King-Emperor on the advice of the Secretary of State for India, and the Secretary of State has a Council, the Council of India, whose advice on almost all questions of Indian policy he must receive, whose concurrence is necessary in certain cases for the validity of his action. The relations of the Secretary of State to his Council are different in character from those of the First Lord of the Admiralty to the Admiralty Board, or of the Secretary of State for War to the Army Council. They also differ—because they are real—from the relations of the First Lord of the Treasury or the Presidents of Government Departments to their respective Boards. They will have to be considered with reference to the Viceroy of India and the executive and legislative Councils through whom the government of India, subject to the control of the central executive, is carried on.

The Council of India.

[1] 39 Vict. c. 10 recites (1) the Act of Union with Ireland which empowered the King to assume such title as he thought fit by proclamation under the Great Seal, (2) the assumption of the title of King 'of the United Kingdom of Great Britain and Ireland,' (3) the Act of 1858 and the vesting of Indian Government in the Crown, and proceeds to empower the Queen by proclamation under the Great Seal 'to make such addition to the style and titles at present appertaining to the Imperial Crown of the United Kingdom and its dependencies as to Her Majesty may seem meet.' The title of Empress of India was shortly after assumed by Her Majesty.

The Secretary of State.

The Secretary of State for India, assisted by his Council, by a Parliamentary Under-Secretary and by a permanent staff, is responsible to the Crown and to Parliament for the exercise of the royal prerogative in the government of India. The Act for the better government of India, 1858[1], regulates the central executive; the local executive and the judiciary were dealt with in Acts of 1861[2]. These Acts, modified in some particulars though not in essentials, constitute the framework of our Indian Government.

The King appoints the great officers for India, the Governor-General or Viceroy, the Governors of Madras and Bombay, and their Councils, and the Judges of the High Courts, by warrant under the sign manual. The Secretary of State exercises a larger discretion, and one more independent of Parliament, than that of any minister except perhaps the Secretary of State for Foreign Affairs. In relation to the Native States, business of political or military character, often very important, must be transacted on his sole responsibility, and he must judge as to the propriety of bringing these matters before the Prime Minister and the Cabinet.

§ 2. *The India Office.*

(a) *The Secretary of State* and *his Council.*

The Council.

Mode of appointment.

Number.

The Secretary of State appoints the members of the Council of India: they are not appointed by the King on his recommendation, nor is he required to make the appointment in Council[3]. The number of the Council was originally fixed at fifteen, of whom nine must have served or resided in India for not less than ten years within ten years of their appointment. The Secretary of State may, if he pleases, forbear to fill vacancies on the Council so long as the numbers are not less than ten[4]. They hold

[1] 21 & 22 Vict. c. 106.

[2] The Indian Civil Service Act, 24 & 25 Vict. c. 54; the Indian Councils Act, 24 & 25 Vict. c. 67; the Indian High Courts Act, 24 & 25 Vict. c. 104.

[3] See as to appointment and conditions of tenure of members of the Council, 21 & 22 Vict. c. 106, s. 10; 32 & 33 Vict. c. 97, s. 1; 39 Vict. c. 7, s. 1

[4] 52 & 53 Vict. c. 65.

office for ten years, subject to the conditions of good behaviour, and liability to removal by address of both Houses of Parliament. But three may be appointed, on special professional or other qualifications during good behaviour, or a member may be continued for five years at the expiration of his ten years' service. The reasons for such last-mentioned appointments, or continuations of appointments, must be laid before Parliament. Tenure.

The Council must meet at least once a week; but the Secretary of State may summon it when and as often as he pleases[1]. Every order or communication proposed to be sent to India, and every order made in the United Kingdom under the Act which provides for the better government of India, must either be brought before the Council at a meeting, or laid on its table for seven days before a meeting. If a majority of the Council should differ from the Secretary of State, he may, except in certain cases where a majority is expressly required, overrule his Council. In such a case he must record his reasons for dissent. The general requirement of submission to the Council, before action is taken, of all communications with India is subject to exception in the case of *secret* or *urgent* orders. Transaction of business.

Secret orders are such as relate to making war or peace, or entering into treaty or negotiation with a native or other State.

Urgent orders seem to be matters in which it is important that the Secretary of State should act at once: and these he must, after acting, communicate to the Council, together with the reasons for urgency.

(b) *The Secretary of State* in *Council.*

So far we have considered the powers of the Secretary of State exercising the prerogatives of the Crown with the assistance of a Council. But there are certain acts which must be done by him *in* Council, and certain matters in which he can only act with a majority of his Council.

[1] The Secretary of State can divide the Council into Committees for the convenient transaction of business. To one of these, the Political Committee, it is usual to communicate *secret* orders.

Things to be done in Council.

Laws made by the Indian Government, or by the Governments of Madras and Bombay, come into force when they have received the assent of the Governor-General, but the King may disallow them, as in the case of a colonial law. Such disallowance is signified to the Government of India by the Secretary of State *in Council*. Again, if the Indian Government desires by proclamations to alter provincial boundaries or to create a provincial Council, the previous sanction of the King is communicated by the Secretary of State *in Council*. Again, the Secretary of State must do certain things *in Council*, although the Council cannot control his discretion: such are appointments, promotions, or removals in the establishment of the India Office, or the making of regulations for the admission of candidates to the Indian Civil Service.

Things to be done with Council.

Again, there are certain matters in which he cannot act without a majority of the Council. Here he must act not only *in* Council but *with* Council. He cannot otherwise grant or appropriate any part of the Indian revenues; or borrow money in Great Britain upon the security of the Indian revenues; or buy, sell, or mortgage real or personal property; or regulate official patronage in India; or deal in various ways with Indian appointments.

It will seem that this Council, whose members may not sit in Parliament, is in the main an advisory board. The cases in which the assent of a majority of the Council is required in order that action may be taken are limited in number; and in all cases the Secretary of State, a Cabinet minister, speaking, it may be, with the authority of the Cabinet, and responsible to Parliament, can make it very difficult for his Council to differ from him.

(c) *Parliamentary Control.*

Things to be sanctioned by Parliament.

In certain matters the action of the Secretary of State and the Council is not valid unless it is sanctioned by Parliament[1]. This sanction may need to be expressed directly, as when the revenues of India are applied to pay for military operations beyond the Indian frontier, or impliedly,

[1] 21 & 22 Vict. c. 106, ss. 15, 32, 54, 56; 39 Vict. c. 7, s. 1.

as where notice of a commencement of hostilities, of the reappointment of a member of the Council, or of proposed regulations for the admission of candidates to the Indian Civil Service, are required to be laid before Parliament for, or within, a certain time.

When a change is proposed in the numbers or salaries of the establishment of the India Office, such change must be made by order of the King in Council (not the Council of India), and the order must be laid before Parliament within fourteen days of its making or of the next meeting of Parliament.

§ 3. *The Indian Government.*

The King appoints by warrant under the sign manual the Governor-General of India, the Governors of the Presidencies of Madras, or Fort St. George, and of Bombay, the members of their respective Councils, the Judges of the High Courts of Calcutta, Madras, Bombay, and the North-West Provinces. All Indian appointments, unless otherwise provided for, are vested in the King, acting on the advice of the Secretary of State.

The local government of India, if one may use such a term of so august a body as the Governor-General in Council, is constituted on the lines of a Crown colony. The acts of the government are the acts of the Governor-General in Council. This is an executive Council appointed by the Crown for a term of five years. In this Council the Viceroy has, like the Secretary of State in the Home Council, a single vote, and a casting vote; but like the Secretary of State he can overrule the decision of his Council, and must then record the grounds of his action. He can make war and peace; but an order to commence hostilities must be made known to Parliament within three months, if it be sitting, or if it be not sitting, within a month of its next Session. He may in Council constitute new provinces, appoint a Lieutenant-Governor to a province so constituted, and define his authority, and he may alter the boundaries of existing provinces. This he does by proclamation, but no such proclamation is of force

The Governor-General in Council for executive purposes:

until the sanction of the King is communicated to the Governor-General by the Secretary of State.

the duties of the Council;

The Council consists of five members, unless the King should be advised to appoint a sixth; and the Commander-in-Chief may be, in fact always is, made an extraordinary member by the Secretary of State[1]. But the executive work of the Government is conducted by departments, more numerous than the members of Council, each under a permanent secretary. Every member of the Council is charged with the care of one or more of these departments, but that of Foreign Affairs is under the Viceroy himself. It should be noted that the permanent secretary does not stand to the member of Council, under whose charge his department is placed, in the same relation as the permanent staff in a department of Government at home stand to their official chief. The Prime Minister would not communicate with the staff of any office unless he was acting in conjunction with the political head of the office, but the secretaries in the Indian Government stand in immediate relation to the Viceroy, and he may confer with or instruct any of them without reference to the member of his Council in charge of the department concerned.

the permanent staff.

The Council for Legislative purposes.

Legislation is effected by the Governor-General in Council, but for these purposes the Council is increased by not less than ten nor more than sixteen additional members, nominated by the Governor-General; of these a certain number must be non-official.

The legislative powers of the Governor-General in Council are wide, but subject to definite limitations[2], and on the introduction of certain sorts of measures the Governor-General has a veto[3]. He may refuse his assent to a law passed by the majority of the Council or may reserve it, and so suspend its operation until the King has

[1] He is also, since 1905, in charge of the army department.

[2] Ilbert, Government of India, ed. 2, p. 116 and pp. 200–4.

[3] The Governor-General's veto affects measures touching :—
(1) the public debt or charging the revenues of India;
(2) the religion or rights and usages of His Majesty's subjects in India;
(3) the discipline of naval or military forces;
(4) the relations with foreign Princes or States.

signified his assent. If he assents the law takes effect, unless and until it is disallowed by the Secretary of State in Council. The Government of the Presidencies is similar in character to the Government of the Indian Empire.

The Provinces.

There are in British India thirteen provinces, which include the two Presidencies of Madras and Bombay, five Lieutenant-Governorships, and six Chief Commissionerships. The Lieutenant-Governors have in each case a legislative, but not an executive, council, with limited powers of legislation [1].

The Presidencies.

The Governor of each of the old Presidencies of Madras and Bombay has a Council for executive and a larger Council for legislative purposes. But his legislation is subject not only to the Royal veto, but also to the veto of the Governor-General. Nor can his Council initiate without the consent of the Governor-General any of the matters which the Governor-General may forbid to be introduced to his own Council, nor, in addition, matters affecting (1) communication by post or telegraph, (2) coinage, (3) the penal code, (4) patent or copyright.

The relations of the Indian army, and of the Indian Courts to the central authority and the central judicature may be more properly discussed in later chapters. It would be beyond the scope of this treatise to go further into the details of Indian Government.

Section V

Miscellaneous Possessions, Dependencies and Protectorates

§ 1. *Miscellaneous Possessions.*

Aden.

Under this heading must be placed some possessions of the Crown which do not fall into either of the preceding sections. The Peninsula of Aden and the Island of Perim, adjacent to it at the mouth of the Red Sea, are governed from Bombay, and in strictness form a part of British India. So too does the Island of Socotra, about 300 miles to the south-east of Aden. The Island of Ascension in the

Ascension.

[1] Ilbert, Government of India, ed. 2, pp. 114, 115.

South Atlantic, with a population of about 166, is under the supervision of the Lords of the Admiralty; so, too, would seem to be the little settlement of Tristan d'Acunha, with its population of eighty-four, where 'the inhabitants practically enjoy their goods in common, and there is no strong drink on the island and no crime[1].' Some small islands in the Indian Ocean, and the Island of Sombrero in the West Indies, are used for lighthouses maintained by the Board of Trade[2]; others in the Pacific are leased by the High Commissioner for the Western Pacific after consultation with the Treasury.

Islands.

§ 2. *Dependent States; Protectorates and Spheres of Influence.*

These relations differ in character: the dependent or protected states may stand in varying degrees of dependence upon the government of this country.

Sphere of influence

But a sphere of influence should at once be distinguished from a protectorate; for the recognition of an area as a sphere of British influence brings the government of this country into no necessary relations with the dwellers on this area: it means no more than this—that other countries have by treaty with the Crown undertaken not to interfere either by acquisitions of territory, creation of protectorates, or imposition of treaty obligations with any influence which the King may be advised to exercise within this area.

and protectorate; control of foreign relations

It would seem to be an essential feature of a protectorate that the foreign relations of the protected state should be under the control of the protecting state; the usual form in which such relations arise in international law is by treaty between these two states, or between the protecting state and other states. In either case, the return for protection would be a subordination of the protected to the protector in all dealings with outside powers.

It would naturally follow that if we interpose between the protected state and foreign powers we make ourselves

[1] Colonial Office List for 1908, p. 405. [2] Ibid., p. 406.

responsible for the security of the subjects of those powers while under the jurisdiction of the protected state. The control of foreign relations therefore necessarily carries with it some rights and duties respecting the internal affairs of the state so controlled, and this leads to difficult questions, some of international, some of municipal law. and internal affairs.

The protectorates with which we are concerned may be divided into those in which there is, and those in which there is not a settled government.

The Indian protected states stand apart. The King is Emperor of India, the rulers of the native states owe political allegiance to him, and though their territories are not British territory, they are for international purposes included in the Indian Empire, and stand in a relation to this country very different to that of the African protectorates where no settled form of government existed, or to states, territorially separate, with definite international relations [1]. It must therefore suffice here to say that there are in India, dependent on the Imperial Government, about 600 native states varying almost infinitely in size, population, and importance, covering nearly 700,000 square miles with a population of fifty-five millions. The degrees of dependence vary, but in all alike we find that the British Government controls the external or foreign relations, makes itself generally responsible for the internal peace and good order of the native state, and specially responsible for the safety of British subjects resident therein, and further requires the native state to assist in repelling attacks from abroad, and in maintaining order at home. India stands apart.

The control thus laid on the action of these dependent states is exercised through a British Resident appointed for this purpose by the Governor-General. The Protectorate here is exercised by the India Office.

The Protectorates in which a settled form of government exists—Zanzibar, Brunei, North Borneo, Sarawak, and the Malay States—possess these features in common, that the British Government by treaty exercises a control over their Protected States: Zanzibar,

[1] Ilbert, Government of India, ed. 2, p. 392. Hall, Foreign Jurisdiction of the British Crown, p. 206.

Malay States,

North Borneo,

Sarawak, Brunei.

foreign relations, and a jurisdiction over British subjects within their territories. The Malay States are practically controlled in their internal affairs by the advice of a British Resident, a phenomenon exhibited on a larger scale in the case of Egypt. North Borneo and Sarawak are curious examples of independent sovereignty exercised by British subjects under the protection of the Crown, but not within the dominions of the Crown. In Sarawak, as in Brunei, foreign relations are controlled and questions of succession determined by the British Government, which also in the case of North Borneo approves the Governor appointed by the Chartered Company.

Protectorates where no state exists.

There remain the Protectorate in the Pacific Islands, and the group of Protectorates in Africa. The rights exercised by the Crown in these places, where no settled government exists, have developed in accordance with the gradually extended construction of the Act of the Berlin Conference of 1885. This Act was designed to meet the creation of protectorates, by the signatory powers, on the African coast, and to ensure securities for law and order to the subjects of states travelling or resident therein.

Jurisdiction :

The rights assumed by the Crown under the Berlin Act were based at first on a strict construction of the Foreign Jurisdiction Act, which enables the Crown to exercise jurisdiction, acquired in certain ways, in foreign countries, over its own subjects and those of consenting powers, and in uncivilized countries over its own subjects [1]. France and Germany, from the first, construed their powers under the Berlin Act more widely, and as conferring jurisdiction over the subjects of other countries than their own.

its development

The Orders in Council made for these regions of the Empire down to the year 1891 show an evident desire to mark a distinction between the rights conferred by a protectorate and those of territorial sovereignty. Thus the Africa Order in Council of 1889 [2] assumed jurisdiction, within the protectorates to which it referred, over British subjects and foreigners who assented, or whose governments had assented, to the exercise of this jurisdiction.

[1] 53 & 54 Vict. c. 37, ss. 1, 2. [2] Stat. Rules and Orders, vol. iii, p. 259.

But the Africa Order of 1892[1] extended this jurisdiction to the subjects of the signatory powers without the express consent of their governments, and the Order in Council of May 9, 1891[2], constituting the Protectorate of Bechuanaland assumes a general jurisdiction over all persons within the area concerned. From this time forward Orders in Council relating to the South African protectorates have followed the lines of the Bechuanaland Order[3]. and extension.

It is to be observed that these Orders are made under powers vested in His Majesty 'by virtue of the Foreign Jurisdiction Act *or otherwise*,' and it may be in virtue of the common law prerogative, applied to a protectorate as though it were ceded territory, for the government of which some provision must be made, that the Orders entrust the representative of the Crown with the very wide powers conferred upon him.

These powers include the provision, by Proclamation, for the peace, order, and good government of all persons within the limits of the Order, 'including the prohibition and punishment of all acts tending to disturb the public peace.' The Crown can, under these orders, acquire land through its representatives, and, where conceptions of ownership in land are vague, or where there are large tracts unoccupied or waste, can exercise a general control over the dealings with the waste[4]. The rights exercised over these protectorates may be said to differ from territorial sovereignty in little but name. Government and jurisdiction.

There still remain for consideration the territories acquired by Chartered Companies ruling as sovereign states under the protection of the Government at home, as in the case of North Borneo and Sarawak, where the central authority is represented by the Foreign Office, or with Chartered Companies.

[1] Stat. Rules and Orders 1892, p. 486.

[2] Stat. Rules and Orders 1891, p. 295. This Order was framed in the Colonial Office, which took a bolder line on this question than the Foreign Office, under which, at this time, several of the African Protectorates were administered.

[3] A similar change is observable in the earlier Orders in Council relating to the Western Pacific and the Pacific Order in Council of 1893.

[4] As in East Africa and Uganda. Stat. Rules and Orders 1898, pp. 381, 382.

powers exercisable under the supervision of a High Commissioner, himself a servant of the Colonial Office, as in the case of North and South Rhodesia.

The Chartered Companies.

The charter of the South African Company [1] enables it to acquire territory, to make ordinances and to exercise jurisdiction, subject to the approval and continuous supervision of the Secretary of State. A good illustration of the practical working of this process can be seen in the Matabeleland Order in Council of 1894 [2]. The charter incorporates the company and confers upon it powers of the nature described above. The Order in Council brings a territory within the limits of these general powers, prescribes definite rules for their exercise, and enables the Secretary of State from time to time to declare that any parts of South Africa south of the Zambesi river, and *under the protection* of His Majesty, shall be included in the limits of the Order.

Spheres of influence.

A sphere of influence would seem to mean an area wherein foreign powers undertake not to attempt to acquire influence or territory by treaty or annexation. Such a mode of dealing is illustrated by the seventh Article of the Anglo-German Agreement of 1890.

Anglo-German agreement.

'The two powers engage that neither will interfere with any sphere of influence assigned to the other by Articles 1 to 4. One power will not in the sphere of the other make acquisitions, conclude treaties, assign sovereign rights or protectorates, or hinder the extension of influence of the other.

'It is understood that no companies nor individuals subject to one power can exercise sovereign rights in a sphere assigned to the other, except with the assent of the latter.'

A sphere of influence is therefore constituted by treaty arrangements with powers outside the area concerned.

Shortly after the making of this treaty Queen Victoria by Order in Council placed the South African sphere of influence under the government of the High Commissioner for South African affairs [3]. We see here the process by

[1] London Gazette, Dec. 20, 1889. [2] July 18, 1894.

[3] Order in Council, May 9, 1891. The Order recites the fact that the territories dealt with are under the protection of Her Majesty, that she

which a sphere of influence may pass into a protectorate, the government of which is provided in the words of the Order.

'In the exercise of the powers and authorities hereby conferred upon him, the High Commissioner may among other things from time to time by proclamation provide for the administration of justice, the raising of revenue, and generally for the peace, order, and good government of all persons within the limits of this Order, including the prohibition and punishment of all acts tending to disturb the public peace.'

Territories leased to the Crown.

I have called attention to somewhat anomalous temporary rights which are enjoyed by the Crown in Cyprus, Weihaiwei, and the district of Kowloon. These territories are, however, under the definite and exclusive government of the Colonial Office, while the British use and occupation of them continues.

Egypt.

Egypt and the Soudan present aspects of British influence and control of a character too complicated and too much involved in political and international relations to be suitable for discussion here. But they cannot be passed over.

Egypt is nominally governed by the Khedive and his ministers, under the suzerainty of the Sultan: but under what are known as the Capitulations a right to the administration of their own civil and criminal law by their own Consuls is enjoyed by the subjects of about fifteen foreign states[1], while the economic difficulties into which Egypt was plunged under Ismail Pasha brought about an international control of Egyptian finance[2]. Two of the great powers, England and France, have long been regarded as entitled to a preponderant voice in the affairs of Egypt, but owing to the course of events in 1882 England was compelled to intervene with a military force, and the armed occupation of Egypt by the forces

has power and jurisdiction in the same by treaty, grant, usage, sufferance and other lawful means, and alleges itself to be made by virtue and in exercise of the powers by the Foreign Jurisdiction Act *or otherwise* in Her Majesty vested. But the Order goes a long way beyond any powers conferred by the Foreign Jurisdiction Act.

[1] Milner, England in Egypt, ch. iv.

[2] Lord Cromer, Modern Egypt, vol. i, ch. x Milner, England in Egypt, ch. viii.

of this country has continued ever since. The presence of British troops has given force to British advice administered by the Consul-General and a staff of advisers assigned to the various departments of Egyptian Government. Under this strange system of government by advice from persons who were not, strictly speaking, officers of the Egyptian State, with no clear certainty as to what would happen if the advice was not taken, but under the general impression that it had better be followed, Egypt has thriven in almost everything that concerns a nation's welfare.

Finally, in 1904, a Convention with France was signed in which, while the British Government declared that 'they have no intention of altering the political status of Egypt,' the Government of the French Republic declared 'that they will not obstruct the action of Great Britain in that country by asking that a limit of time be fixed for the British Occupation or in any other manner[1].'

It would seem that the relation of Egypt to this country is that of an ill-defined and avowedly temporary protectorate.

The Soudan.

That of the Soudan is more distinct. The Soudan was abandoned, and ceased to be a part of the Ottoman Empire after the death of Gordon and the fall of Khartoum. It was reconquered by the arms and at the cost of Great Britain and Egypt. Shortly after the conquest Lord Cromer announced at Omdurman to the assembled Sheikhs that they would henceforth be governed by the Queen of England and the Khedive of Egypt[2]: and an agreement was soon after signed between the representatives of England and Egypt providing for the government of the Soudan. The Governor-General is appointed by the Khedive on the advice of the British Government; his proclamations have the force of law; no foreign consul may reside in the country without our consent, and thus the tangle of the Capitulations was swept away. Egypt has been called the Land of Paradox, and her relations with England during the last thirty years have the elements of comedy, of tragedy, and of romance. The last two are prominent in the history of the Soudan.

[1] Lord Cromer, Modern Egypt, ii. 391.

[2] Ibid., 115-8.

CHAPTER VI

THE CROWN AND FOREIGN RELATIONS

Representative character of the Crown.

For external purposes the Crown represents the community. No person or body save the King, by his ministers or his accredited representatives, can deal with a foreign state so as to acquire rights or incur liabilities on behalf of the community at large.

The prerogative of the Crown in this respect is exercised, subject always to the collective responsibility of the Cabinet, through one of His Majesty's Principal Secretaries of State, to whom is entrusted the business of communicating with the representatives of foreign states in this country, and with our own representatives in other communities.

§ 1. *The Foreign Office.*

The staff of the Foreign Office.

The Secretary of State for Foreign Affairs is assisted by two Under Secretaries of State, one of whom is political, the other permanent; three assistant Under Secretaries, a Librarian, a head of the Treaty Department, and a staff of clerks [1].

Its procedure.

The Secretary of State has certain formal duties, such as the presentation of the representatives of other powers to the Sovereign: he is also the channel of communication between individuals or departments of government and foreign countries in any matter in which the intervention of a foreign government may be sought; but the most serious part of his business consists in framing and carrying out a policy for this country in relation to other countries. For this last purpose he must be in constant communication with the representatives of foreign powers in this country, and with our diplomatic agents abroad,

[1] Foreign Office Guide, 4, 5.

who are responsible to him for their action, as he is responsible to the Cabinet and to Parliament. All communications which are of sufficient importance to go before the Secretary of State fall into one of two groups.

When letters or dispatches of an ordinary character arrive they are sent by one of the clerks to one of the Under Secretaries, he reads and sends them on to the Secretary of State, who reads them, gives instructions, and returns them. The Under Secretary, having studied the instructions, sends the papers to the clerk into whose department they fall, who registers them and carries out the instructions given.

But important dispatches and correspondence with our ministers abroad do not end here. The dispatches and, if necessary, the drafts of answers are sent, first to the permanent Under Secretary, then to the Prime Minister, then to the King, and, as we have seen, time must be given to the Sovereign to form an opinion upon important dispatches before they are sent; lastly, they are circulated among the members of the Cabinet. The Library of the Foreign Office is the ultimate depository of the transactions of the Office [1].

§ 2. *Diplomatic Agents and Consuls.*

But it is obvious that important and pressing matters cannot be dealt with wholly by correspondence. So in all foreign civilized states of any importance the interests of this country are superintended by two classes of agents resident on the spot: diplomatic agents and consuls.

Diplomatic agents.

A diplomatic agent may, in point of dignity, be an ambassador or merely a *chargé d'affaires*. He may be permanently accredited to the Court of a foreign country, or he may be dispatched on a special mission: but in all cases he represents the state from which he is sent.

One state may refuse to receive or retain the diplomatic agent of another, either because it desires to break off all friendly relations and enter upon a state of war, or because

[1] Report of Committee on Diplomatic Service, Parliamentary Papers, 1861, vol. vi, p. 75. Evidence of Mr. Hammond.

the individual agent is personally disagreeable, or politically hostile to it, or because his reception would amount to an admission of claims which it does not recognize, as in the case of the Papal legates of days before the English Reformation.

Forms of appointment.

The forms of appointment and the immunities of diplomatic agents may be properly dealt with here. The forms vary. Ambassadors and envoys plenipotentiary receive powers to treat and negotiate under the Great Seal, and also a letter of credence, under the sign manual, to the Sovereign or President of the country to which they are sent. A *chargé d'affaires* has no such ample powers, and his letter of credence is signed by the Secretary of State [1].

Immunities,

Persons thus accredited either by the King of this country to other states, or by other states to the King, enjoy certain immunities from the law of the land in which they reside.

and the reason for them.

It is sometimes said that such immunities, like privilege of Parliament, exist because they are necessary for the purpose of enabling those who enjoy them to discharge their duties without hindrance; but the more correct view seems to be that they rest on the representative character of the diplomatic agent. The immunities which would be due to his Sovereign are due to him. In one respect he is not merely free from, but outside of, the law of the state to which he is accredited. His children born there are not subjects of that state, but follow the nationality of their father [2].

From criminal

Besides this he is exempt from its criminal jurisdiction, though exceptions may be noted in which an ambassador, having taken part in conspiracies against the state to which he is accredited, has been arrested and kept in custody [3].

He is also exempt from its civil jurisdiction. The limits

[1] For forms of power to treat and negotiate, and of letters of credence, see Appendix.

[2] Hall, International Law, 5th ed., p. 174.

[3] Ibid., p. 172, and see cases there cited. Martin, Causes Célèbres, i. 103.

and civil jurisdiction,

of this exemption differ in different countries; so does the authority for the exemption. In some it rests on general principles of international law embodied in the common law of the land[1]. In some it is based on the same principles affirmed, as such, in a civil code. In our own country the exemption is a specific piece of Statute law making no pretension to embody any general principles, but passed admittedly to prevent the recurrence of a scandal.

in England.

The Act 7 Anne, c. 12, after reciting the insults offered to 'his excellency Andrew Artemonowitz Matneof, ambassador extraordinary of his Czarish Majesty, Emperor of Russia,' who had been pulled out of his coach and detained, goes on to enact that

Statute Law.

'To prevent the like insolences for the future be it further declared by the authority aforesaid that all writs and processes that shall at any time hereafter be sued forth or prosecuted whereby the person of any ambassador or other publick minister of any foreign prince or state authorized and received as such by Her Majesty her heirs or successors, or the domestick or domestick servant of any such ambassador or other publick minister may be arrested or imprisoned or his or their goods or chattels may be distrained seized or attached shall be deemed and adjudged to be utterly null and void to all intents constructions and purposes whatever.'

General principle.

But behind this enactment lies a general principle accepted by our Courts and reaching far beyond the exemption from civil process of an ambassador and his suite. This is laid down in the case of the *Parlement Belge*.

'We are of opinion,' said Brett J., delivering the judgment of the Court of Appeal, 'that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or *over the public property of any other*

[1] So I understand Mr. Hall's description of the rule laid down by the French Courts, p. 173.

state which is destined to its public use, or over the property of any ambassador, though such sovereign, property, or ambassador be within its territory, and therefore, but for the common agreement, subject to its jurisdiction [1].'

Suite and servants.

The civil immunity extends to the suite and servants of a diplomatic agent, not apparently in their own right, but because of their necessity to the dignity or the duties of their master [2]. The question of the immunity of such persons from criminal jurisdiction is not settled. In England they are held liable to the criminal law. In other countries the difficulty seems to be evaded by the readiness of the master to hand over the delinquent servant to justice [3].

House.

The territorial immunities of the house of a diplomatic agent are also doubtful. Where the agent himself is liable to be arrested on the grounds stated above, the privileges of his house end with his own; where a servant or member of his suite has committed an offence against the criminal law, it would seem that in England and France it is the practice to disregard the immunity of the house for the purpose of making the arrest [4]. When the offence has been committed by a subject of the country to which the agent is accredited, it is obviously right that the law should take its course. In short, the house of a foreign minister does not appear to be, like a public ship in a foreign harbour, extra territorial, but merely exempt from jurisdiction so far as is necessary to support the dignity of the minister and to enable him properly to discharge his duties.

A consul,

A consul does not represent the state in its external relations to other states, unless, as sometimes happens, he is clothed with a diplomatic character in addition to his consular functions. Otherwise he is merely employed to attend to the interests of British subjects during their stay in the country wherein he is engaged to reside.

[1] The *Parlement Belge*, 5 P. D. 197. See also *Mighell* v. *Sultan of Johore* (1894) 1 Q. B. C. A. 149.

[2] If the servant of an ambassador engage in trade he is liable under the bankruptcy laws. 7 Anne, c. 12, s. 5.

[3] Hall, ed. 5, p. 179.

[4] Ibid., pp. 180–4.

his duties, His business is to issue or affix a *visa* to passports for British subjects when needed, to authenticate documents, and births and deaths, and to take statements from captains of British ships as to injuries sustained at sea. He receives complaints of British subjects as to any injustice inflicted, and communicates with the local authorities, he administers the property of such as die in the country of his residence, and arbitrates on disputes which they may bring before him; he collects information, commercial and economical, and forwards it to the Foreign Office.

how far judicial. Apart from Statute or Order in Council requiring a consul to exercise a jurisdiction possessed by the Crown in a foreign land, the consular office has no inherent judicial power. Such as is exercised by consuls may best be dealt with under the head of foreign jurisdictions.

A consul is appointed by commission or patent from the government of the country which employs him. This needs to be confirmed by an *exequatur*, a document issued by the government of the country wherein the consul's duties are to be discharged. In England such documents are issued from the Foreign Office. The *exequatur* may be refused or withdrawn if the consul should be personally unacceptable or should misconduct himself in the exercise of his office.

Consular immunities. The immunities of a consul are of somewhat uncertain extent. Practically he is entitled to have his archives and other official documents treated as inviolable, and to be exempt from such personal liabilities (such as serving on juries or in the militia) as would interfere with the continuous discharge of his duties[1].

§ 3. *War, Peace, and Treaties.*

The prerogative of making war: The King, acting on the advice of his Ministers, makes war and peace. The House of Commons may refuse supplies for a war, or either House may express its disapproval by resolutions condemnatory of the ministerial policy, or

[1] For a fuller account of consular duties and privileges, see Hall, International Law, pp. 316–20, and Foreign Jurisdiction of the Crown, p. 16.

by address to the Crown, or by making the position of the ministry in other ways untenable: but Parliament has no direct means either of bringing about a war or of bringing a war to an end.

how far controlled by Parliament.

Nor does a decided expression of opinion by the House of Commons always overbear the policy of a ministry. In 1782 a resolution of the House of Commons, followed by an address to the Crown, caused Lord North to take steps to end the war with the American colonies[1]; but in 1857 a resolution of the same House, condemnatory of the war with China, caused Lord Palmerston to appeal to the country, with the result that the electors affirmed his policy and returned a majority of his supporters to Parliament.

Peace and treaties.

The prerogative of the Crown in making peace is so much involved in questions as to the prerogative in making treaties that the two must be dealt with together. Parliament has only indirect means of bringing a war to a close, but it is hard to conceive of a peace concluded simply by a cessation of hostilities and mutual assurances of amity. Some engagements must be entered into; liabilities incurred; territory acquired or ceded; and a question arises in this form: No one but the King can bind the community by treaty, but can he always do so without the co-operation of Parliament? It would seem to follow from the general principles of our constitution that a treaty which lays a pecuniary burden on the people or which alters the law of the land needs Parliamentary sanction. If it were not so the King, in virtue of this prerogative, might indirectly tax or legislate without consent of Parliament.

Limits on power to make treaties.

Questions arise, however, in relation to this prerogative which need fuller consideration. Can the King cede territory by treaty without consent of Parliament, or can he confer immunities on foreigners, or affect the rights of private individuals except with such consent?

The cession of territory is a matter 'in regard to which the practice of consulting Parliament has varied widely

[1] Cobbett, Parl. Hist., xxii, pp. 1084, 1214.

Cession of territory:

from time to time[1]': but the tendency has been undoubtedly in the direction of obtaining the sanction of Parliament more regularly, and not merely by an address to the Crown, or a vote signifying approval, but making the treaty or convention conditional on the approval of Parliament and by the embodiment of the provisions relating to the cession in the schedule of a Statute.

In the eighteenth century the exercise by the Crown of this prerogative was unquestioned, but ministers might suffer if a mistake was made. Blackstone says:—

'A king may make a treaty with a foreign state which shall irrevocably bind the nation; and yet when such treaties have been judged pernicious, impeachments have pursued those ministers by whose agency or advice they were concluded[2].'

in 1783,

The peace of 1783 involved not merely the cession of Minorca and Florida, but the surrender of the sovereignty over the American colonies to those who had, up to that time, been subjects of the Crown. No statutory sanction was obtained for these cessions, beyond an Act[3] which empowered the King to conclude a peace or truce with the Colonies, and for that purpose to annul or suspend any Acts of Parliament which related to those colonies. Nothing is said of surrender of sovereignty or cession of territory. In the Addresses, moved in the two Houses, of thanks to the King for the conclusion of peace with France, Spain, and the American colonies, Lord Loughborough expressed himself as convinced that the King had exceeded his prerogative by the cessions of territory involved[4]; but he was flatly contradicted by Lord Thurlow. No one in either House followed up the discussion on these lines, nor do the noble Lords themselves appear to have been much impressed with the force of their own arguments, which were designed for party ends.

The same sort of question was raised when the sove-

[1] Lord Percy, moving the second reading of the Anglo-French Convention Bill. Hansard, 4th series, vol. cxxxv, p. 502.

[2] Blackstone, Comm. i. c. 7, p. 251.

[3] Geo. III, c. 46.

[4] Parl. Hist., vol. xxiii, p. 430.

reignty of the Orange Free State was abandoned in 1854[1]: but it should be noted that the Attorney-General, Sir A. Cockburn, expressly defended the transaction on the ground that the territory in question had been acquired by conquest. He drew a distinction between a colony so acquired and one acquired by settlement, or, as he called it, 'by occupancy.' Under such circumstances

in 1854.

Suggested limitations of prerogative.

'he was aware that there existed considerable difference of opinion as to whether the Crown had the power of getting rid of those territories otherwise than by an Act of the Legislature. On the other hand, with regard to colonies acquired by conquest and by cession, it was clear that the Crown had an undisputed and absolute sovereignty over them, and that the persons there did not acquire any right to the laws and institutions of this country.'

The cession of sovereignty to the Orange Free State took place without further question, but the limits on the prerogative in this matter have been since then from time to time considered in Parliament or discussed by eminent legal authorities. Starting from the point indicated by Sir A. Cockburn, and assuming that the King may cede territory acquired by conquest or cession, it has been maintained that his powers may be limited even in the case of such territories if they have been the subject of legislation by the Imperial Parliament, or if the King, by his own act, in conferring upon them representative institutions, has put it out of his power to legislate by Order in Council. The prerogative of cession, if this view is correct, would be coextensive with the right to legislate by Order in Council.

There seems, however, to be a consensus of opinion that at the close of a war, and for the purpose of concluding a peace, the prerogative of cession is wider than it would be in time of peace.

We must look for authority to judicial decision and the practice of the State, and this practice is guided, we must presume, by the opinions of the legal advisers of the Crown.

Of judicial opinion there is but little. In 1876 a case

[1] Hansard, 3rd Series, vol. cxxxiii, p. 82.

Judicial decision.

came before the Judicial Committee of the Privy Council on appeal from the High Court of Bombay. That Court had held, for the purposes of a judgment in a particular case, that territory had been ceded, and that the Crown had no power to make such cession in time of peace without consent of Parliament. The Judicial Committee reversed the judgment of the Indian Court, and while holding that what had taken place did not amount to a cession, expressly stated that their Lordships entertained grave doubts 'as to the soundness of the general abstract doctrine laid down' on this question of the prerogative of cession [1].

It should be observed that this is an Indian Appeal, and I believe that there is a mass of precedent for cession of territory in our Indian Empire, to which no Parliamentary assent was given, ranging over a long period of years and reaching comparatively recent times. This seems to show that we cannot draw precedents from this portion of the King's dominions.

Practice of State.

There remains the practice of the State, and here we find two remarkable modern instances of the submission to Parliament of the terms of a treaty already negotiated by the Ministers of the Crown.

Case of Heligoland.

In 1890 Queen Victoria, in concluding a treaty with the Emperor of Germany, which provided among other things for the cession of Heligoland to the Emperor [2], was advised by her Ministers to make the cession conditional on the approval of Parliament. This invitation to Parliament to share in the exercise of the prerogative rights of the Crown, and therewith to assume the responsibilities of the Executive, was much criticized in debate. The views of the Opposition were thus forcibly stated by Mr. Gladstone:—

'There is one thing which I think is still higher than the *dicta* of legal authorities, in this important question, and it is our long, uniform, and unbroken course of practice. It is one thing to stand upon the opinion of an ingenious or even a

[1] *Damodhar Gordhan* v. *Deoram Kangi*, i. App. Ca. 352. [2] 53 & 54 Vict. c. 32.

learned man: it is another thing to cite the authority of an entire State, signified in practical conclusions, after debate and discussion in every possible form, all bearing in one direction, and stamped with one and the same character. It is hardly possible, I believe, to conceive any kind of territory—colonies acquired by conquest, colonies acquired by settlement, with representative institutions or without representative institutions—it is not possible to point out any class of territory where you cannot show cases of cession by the Crown without the authority of Parliament[1].'

Mr. Gladstone was doubtless right in his statement as to the facts of cession, though 'debate and discussion' can hardly be said to have been as exhaustive as he described them. Mr. Balfour spoke of the question as being 'in a nebulous condition,' but asserted that 'eminent legal authorities consulted specifically' had maintained the necessity for Parliamentary assent. Mr. Goschen admitted that the course taken by the Government was a departure from practice, and did not involve the proposition 'that the assent of Parliament is indispensable to treaty making or even to a cession of territory.'

The Anglo-French Convention.

The course taken in 1890 was followed in the case of the Anglo-French Convention in 1904, in which various points at issue between the two countries were settled on terms which involved cessions of territory to France. No question was raised in either House of Parliament, except as to the expediency of the terms, when the Bill which embodied the Convention was under discussion.

We seem, then, to be drawn to this conclusion, that apart from precedents relating to Indian territory, it has of recent years been thought desirable, if not necessary, that the consent of Parliament should be given to the cession of territory in time of peace. Cessions made at the conclusion of peace or in course of a war, or of lands acquired by conquest or cession, for which Parliament has not legislated, and for which the King has not by his own act deprived himself of the power of legislating by Order in

[1] Hansard, vol. cccxlvii, p. 764.

Council, would seem to stand on a different footing. We can but follow the practice of the State, and this must be taken to accord with the best legal advice which the King's Ministers can obtain.

But the expediency of embodying treaties of this character in Bills submitted to Parliament is still an open question. Parliament can always express its disapproval of a treaty, or Ministers can, if they are strong enough in Parliamentary support, obtain an expression of approval. It may be doubted whether Ministers ought not to be prepared to accept the responsibility of the exercise of the treaty-making power by the Crown, and whether the ratification of a treaty should be dependent upon the goodwill of a popular assembly.

In support of the view that such treaties should be submitted to Parliament is the fact that cession of territory necessarily affects the rights and duties of the dwellers on the ceded territory. It affects their nationality either by the extinction of the state under whose sovereignty they lived, or by the transfer of that portion of the country in which they lived to another sovereign. The first case is illustrated by the transformation of the Orange Free State, an independent political society, into the Orange River Colony, a part of the King's dominions. The second by the transfer of Heligoland from England to Germany.

In the first case it is usual to allow those who would avoid their new nationality to leave the conquered state [1]: in the second case provision may be made by treaty or otherwise for those who desire it to retain their old nationality. But in all such cases, as it would seem, specific provision must be made if the effect of cession in changing the nationality of the dwellers on the ceded lands is to be averted.

And the King by cession of territory can not only change the nationality of his subjects, but can affect in some

[1] The case of a foreigner, naturalized in the conquered state, who has not lost his own nationality, can be met by permission to declare an intention to retain that nationality, to revert to his domicile of origin, and remain, a foreigner, in the conquered state.

respects their civil rights. Thus, if a question was in issue between an inhabitant of the ceded territory and his Government in respect to rights over land in that territory, the remedy of the inhabitant, if transferred at all, would be transferred from the old to the new sovereign[1]. But a demand in the nature of a money claim against the old Government, even if it were a part of the public debt, could only be transferred to the new Government by the terms of a treaty, or by a novation involving the action of all three parties, the two Governments and the claimant.

Charges on subject.

The assumption by this Government of any portion of the public debt of a country acquired by cession would lay a charge, or might do so, on the subjects of this country, and a definite and well-recognized limit on the treaty-making power of the Crown is found in the rule above mentioned, that where a treaty involves a charge upon the people, or a change in the general law of the land, it may be made, but cannot be carried into effect without the consent of Parliament.

Changes in law.

Treaties which thus affect the rights of the King's subjects are made subject to the approval of Parliament, and are submitted for its approval before ratification, or ratified under condition.

Such are treaties of commerce which might require a change in the character or the amount of duties charged on exported or imported goods: or extradition treaties which confer on the executive a power to seize, take up, and hand over to a foreign state persons who have committed crime there and taken refuge here[2].

Grant of immunities.

The right of the Crown, by treaty merely, to extend to foreigners immunities from the law of the land, which would affect the private rights of citizens, was raised in the case of the *Parlement Belge*[3].

It was alleged in that case that Queen Victoria had,

[1] It does not follow that they would be transferred at all. *Cook* v. *Sprigg*, 1899, A.C. 57.

[2] Forsyth, Cases and Opinions in Constitutional Law, 369.

[3] L. R. 4 P. D. 154-5.

by convention with the King of the Belgians, conferred upon a ship, assumed by the Court to be a private ship engaged in trade, the immunities of a public ship, or ship of war, so as to disentitle a British subject from proceeding against her for injuries sustained in a collision. Sir Robert Phillimore held that the treaty-making prerogative did not extend this length, and gave judgment against the ship [1]. His decision was reversed by the Court of Appeal [2], but on a different ground, namely, that the *Parlement Belge was* a public ship, although not a ship of war, being used for a national purpose, the transmission of mails. The Court carefully abstained from expressing any opinion on the point on which Sir Robert Phillimore mainly rested his judgment.

The same question was raised, and evaded, in *Walker* v. *Baird* [3]. The working of a lobster-factory on the coast of Newfoundland was stopped by an officer entrusted with the enforcement of an agreement made between the Crown and the Government of France. The owner of the factory brought an action, and it was held to be no defence to allege that the conduct of the officer was 'an act of state.' Whether or no it could be justified by the treaty-making power of the Crown was discussed but not settled, inasmuch as the statement of defence assumed that the mere allegation that the acts were done in pursuance of a treaty took the matter out of the cognizance of the Court. This was not the view of the Judicial Committee. It was admitted that the Crown

'could not sanction an invasion by its officers of the rights of private individuals whenever it was necessary in order to compel obedience to the terms of a treaty.'

'Whether the power contended for does exist in the case of treaties of peace, and whether if so it exists equally in cases akin to a treaty of peace, or whether in both or either of those cases interference with private rights can be authorized otherwise than by the Legislature, are grave questions upon which their Lordships do not find it necessary to express an opinion.'

[1] L. R. 4 P. D. 154. [2] L. R. 5 P. D. 197. [3] [1892] A. C. 491.

§ 4. *Foreign Jurisdiction.*

The King can 'by treaty, capitulation, grant, usage, sufferance, and other lawful means,' exercise jurisdiction within divers foreign countries. The history of foreign jurisdiction of this nature begins with the Levant Company, which obtained a charter in 1581, renewed in 1606 and 1662, conferring power to appoint consuls who should administer justice between merchants 'in all places in the dominion of the Grand Seignior and in other Levant Seas [1].' By capitulations made with the Ottoman Porte suits between subjects of the Crown were, throughout the territories specified in the charter, to be decided by the judges therein described, and not by the local Courts.

Usage appears to have extended this jurisdiction from cases in which both parties were British subjects, to cases in which the defendant only was a British subject, and to cases of crime committed by British subjects.

When the Levant Company ceased to exist it became necessary to provide for the exercise of this jurisdiction otherwise than by the Company's charter, and perhaps also some doubts had arisen as to the power of the Crown to create such jurisdictions by mere exercise of the prerogative [2]. In 1843 began the series of Foreign Jurisdiction Acts, which are now consolidated in the Act of 1890 (53 & 54 Vict. c. 37). The purport of these Acts has been to give to the Crown full power to provide by Order in Council for the exercise of such jurisdictions, wherever 'by treaty, capitulation, grant, usage, sufferance, and other lawful means,' they have been acquired or have come into existence [3].

Statutes on subject

[1] See Tarring, British Consular Jurisdiction in the East, p. 9.

[2] Hall, Foreign Jurisdiction of the British Crown, p. 9.

[3] For an account of the history of consular jurisdiction, and of the law (Statutes, Orders in Council, and decided cases) down to 1887, see Tarring, Consular Jurisdiction in the East. See also Hall, Foreign Jurisdiction of the British Crown, Part iii, and for the most recent statements of the law, Jenkyns, British Rule and Jurisdiction beyond the Seas (1902), and Ilbert, Government of India, ch. v.

Character of jurisdictions.

Foreign jurisdictions exercised in consular courts exist at the present time (1) in civilized independent states by virtue of express treaty, as in Turkey, Persia, China, and Japan; (2) in protected states with a settled form of government, as in certain protected communities, where the relation of suzerain and dependent state involves such a jurisdiction [1]; (3) in countries with no settled form of government, as in the African protectorates or in the Pacific islands.

Where such a jurisdiction takes its origin from treaty, its extent and the persons over whom it may be exercised must be the matter of express agreement. In the other cases, the exercise of jurisdiction over others than the King's subjects is a question with which I have dealt at sufficient length in the preceding chapter [2].

Process of their creation.

It is enough here to call attention to these foreign or consular jurisdictions, and to point out the three stages by which they come into being:—

(1) The treaty or rule of international law which renders their existence possible;

(2) The Statute which gives and defines the power by which the King creates them;

(3) The Order in Council by which they are in fact created, and their extent prescribed as to the law to be administered and the persons who are to be subject to it.

[1] The jurisdictions exercised in the dependent Indian states do not originate in treaty, but in the relation of suzerain and dependent state; they are the concern of the India Office, and not of the Foreign Office, and however analogous they may be to the matter in the text, they are not 'foreign' or consular jurisdictions.

[2] The subject of Foreign Jurisdiction is treated exhaustively by Mr. Hall, Foreign Jurisdiction of the British Crown.

CHAPTER VII

THE REVENUES OF THE CROWN AND THEIR EXPENDITURE

SECTION I

THE REVENUE [1]

THE revenues of the Crown are not, as the term would seem to imply, an income which the King receives to spend at his pleasure. Here as elsewhere in our Constitution the identification of the Crown as the individual Sovereign with the Crown as the executive government has produced a misleading terminology. The so-called revenues of the Crown are for the most part the sums paid, in various forms, by the people for the maintenance or promotion of the various objects for which the Government exists. The ancient hereditary revenues of the Crown are thrown into the common stock for this purpose. Out of this common stock a sum bearing a very small proportion to the whole, £110,000 out of about £156,000,000, is assigned to the King and Queen to be used at their discretion. The rest goes to satisfy those national objects which cannot be satisfied except by money payments, and is appropriated precisely to these several objects of Parliament, annually in the Appropriation Act, or once for all by permanent Statute.

Sources of Revenue.

The arrangement of the great branches of the revenue in the annual statement of national income and expenditure furnished to Parliament affords the outline which I must follow in the earlier part of this chapter. The taxes are not arranged in their historical order, nor, in the case of

[1] The authorities for this section, apart from the Statute Book, are Dr. Stubbs' Constitutional History, Mr. Dowell's History of Taxation, and the Public Income and Expenditure Return of 1809 [366].

the Excise and Stamp duties, do the terms explain the nature of the taxation involved. But the order and the terms constitute the authorized version, and it is safer to adopt them as they stand.

The sources of revenue are thus arranged (I append the figures for the years ending March 31, 1895 and 1908)[1]:—

		£	£
Tax revenue.	Customs	20,115,000	32,490,000
	Excise	26,050,000	35,720,000
	Estate Duty		19,070,000
	Stamps	14,440,000	7,970,000
	Land tax and House duty	2,450,000	2,690,000
	Property and Income tax	15,600,000	32,380,000
Non-Tax revenue.	Post Office	10,760,000	17,880,000
	Telegraph Service	2,580,000	4,420,000
	Crown Lands	410,000	520,000
	Suez Canal Shares and Sundry Loans	412,976	1,190,000
	Miscellaneous	1,865,785	2,208,000
		94,683,761	156,538,000

The first six items in this list represent revenue derived from taxation; the others represent income arising either from business carried on by the Government, or from property or investments.

Some of these sources of revenue have a long and interesting history; some are modern. The Customs and the taxes on land and property are associated, though not in their present form, with the great constitutional struggles of the fourteenth and seventeenth centuries. The Crown lands take us back to Saxon times. The Excise and the

[1] There are two points of difference to be noted in these accounts: (1) the account for 1895 represents the revenue as it stood after deductions made, as a payment to local taxation accounts, from customs, excise, and stamp duties. This payment amounted in 1895 to nearly £7,000,000. The account for 1907 represents the revenue without this deduction for payment towards local taxation, which now amounts to more than £11,000,000. (2) In 1895 the estate duties were included in the stamp duties, and produced £10,854,983, out of a total of £16,727,726, of which £2,140,000 went in aid of local taxation.

Post Office mark the beginning of a new financial system under Charles II. The Stamp duties and the Estate duties represent the ingenuity of modern finance. But I will take the taxes in the order in which they are presented to Parliament, and describe so much of the nature of each, and of its history, as may seem important to be set forth.

§ 1. *The Customs.*

Origin of customs.

The liability of imported articles to a charge levied by the King is of very ancient date. The charge seems, in its origin, to have been a re-payment to the King for cost incurred in maintaining the ports and keeping the sea clear of pirates. That it was increased in order to enrich the Crown seems plain from the words of Magna Charta wherein the King promises that he will not levy evil tolls upon merchants. A prise or prisage upon imported wine, duties on imported woad[1], fish, and salt, and an export duty upon wool and leather, appear to have been recognized at the end of the twelfth and throughout the thirteenth century.

The Charter.

The *antiqua custuma*: 1297.

In 1275 there was granted to Edward I, in substitution for the indefinite 'ancient and rightful customs' of the Charter, an export duty of half a mark or 6*s.* 8*d.* on every sack of wool, and on every 300 woolfells, and a mark on every last of leather. These duties were excepted by the King in the *Confirmatio Chartarum* from the renunciation therein made of his right to levy tolls on merchandise. They were henceforth known as the *antiqua custuma*.

The *nova custuma*.

The *nova custuma*, first imposed by Edward I in 1303, and confirmed after some vicissitudes in the Statute of Staples in 1353[2], had a different origin, and ostensibly a different incidence, since it was a charge upon foreign merchants. It was a charge of 10*d.* on the sack of wool and on every 300 woolfells exported by alien buyers, and of 3*d.* in the pound on all goods imported. The *antiqua custuma* and the *nova custuma*, together with the Prisage and Butlerage upon wines imported by English and foreign

[1] Madox, Exchequer, xviii. § 4.

[2] 27 Ed. III, st. 2.

merchants, remained a part of the hereditary revenues of the Crown until the two customs duties were absorbed in the grants of tunnage and poundage made to the Crown at the commencement of each reign. Prisage and Butlerage were excepted from the consolidation of the customs duties at the beginning of the reign of Charles II; their proceeds were granted by the Crown to subjects, and they were commuted in 1803 for annuities charged on the Consolidated Fund, and payable to the persons entitled to exact the charge at the ports of England and Wales.

Prisage and Butlerage.

Tunnage and Poundage.

A grant of Tunnage and Poundage meant a duty on exports and imports distinguished from the above-mentioned duties by the name of Subsidy. We must be careful to bear in mind the two senses in which this term is used as applied to direct, and to indirect taxation; in both it means a specific Parliamentary grant as opposed to the hereditary revenues of the Crown, but in the department of direct taxation 'subsidy' has a technical meaning to be explained hereafter. The subsidy of Tunnage and Poundage is kept apart as an item of revenue from the ancient and from the new or small customs, and the controversies to which it gave rise had a different history.

Export duty on wool.

Throughout the greater part of the fourteenth century the King claimed the right to levy a toll upon exported wool, woolfells, or leather, over and above the customs above mentioned, and to make separate agreements with merchants for a payment on the tun of imported wine, and the pound of imported goods. This right was never admitted by Parliament, and at last, in 1371, it seemed as though the controversy was closed.

Uncertainty as to import duties.

The settlement as to impost on wool was embodied in a Statute whereby the King was precluded from taking more than the ancient customs without consent of Parliament. In the matter of Tunnage and Poundage, Parliament seems to have thought that it had done enough in making an express grant of 2*s.* on the tun of wine, and 6*d.* on the pound of exported and imported goods, except wool and skins. The King was not expressly precluded from raising these rates, and the door was thus left open for an arbitrary

increase in the royal revenues. The advantage taken of this opening by the Tudor queens and James I is commemorated in the arguments in Bate's case [1].

Export and import duties, 1376–1660.

But from 1376 down to the re-settlement of the Revenue at the Restoration, tunnage and poundage at various rates was granted either for a term of years or for the life of the King, and what we now call by the general term customs, appears to fall under three heads.

(1) The ancient customs, together with prisage and butlerage.

(2) The subsidy on exported wool.

(3) The duty, at a rate fixed by Parliament, on the tun of imported wine, and the pound of imported goods.

The Tudor impositions.

These last two Parliament was careful to keep in its hands; the subsidy by the provisions of the Act of 1371 [2], tunnage and poundage by the terminable nature of the grant. But this was an insufficient security. The Tudor queens laid fresh imposts on cloth and sweet wines without consulting Parliament; and in Mary's reign the rating of merchandise upon the value sworn to by the merchant was abandoned and the values at which goods of different sorts should be rated was set forth in a Book of Rates [3].

The Book of Rates.

James I increased by an act of prerogative the statutory poundage upon certain articles of commerce and modified the Book of Rates after consultation with the chief merchants, and without reference to Parliament. The resistance of Bate to the payment of the added duty on currants, the decision of the Court of Exchequer in favour of the Crown, the exhaustive discussion in the House of Commons in 1610, and the final limitation of the royal prerogative in this respect by the Long Parliament, are matters with which I have dealt elsewhere [4].

Bate's case.

Consolidation of 1660.

In 1660 the customs were consolidated, and the rates at which commodities should be charged were classified in the Statute which granted this portion of the revenue to the Crown. The old distinctions of ancient and new

[1] Part i, Parliament, ix. 83.
[2] 45 Ed. III, c. 4.
[3] Dowell, History of Taxation, i. 165.
[4] Part i, Parliament, ix. § 3.

customs, subsidies and imposts, were wiped out, and rates were classified under four heads:—

(1) The tunnage on wine.
(2) The poundage on imported goods.
(3) The poundage on exported goods.
(4) The duty on woollen cloth [1].

These were granted to Charles II for life, and in like manner to James II.

New duties were imposed in the reign of William and Mary, and in 1698 an increased percentage was charged upon the articles specified in the Act of 1660, under the title of the New Subsidy. Further percentages were charged during the war of the Spanish succession in 1703 and 1704, during the war of the Austrian succession in 1747, and during the Seven Years' war in 1759: but the export duty on woollen manufactures was repealed in 1700.

Further complications.

Thus our revenue laws had become extremely complex when a fresh consolidation of customs was carried into effect by Mr. Pitt in 1787 [2]. Hitherto the complication of the customs duties had extended not only to their collection but to their expenditure: the usual practice of the legislature was to appropriate each duty, when imposed, to a specific service, and thus it came about that while some few duties were left unappropriated and could be used by Parliament for any service of the year, others were assigned, as they came in, to funds made up from various sources and devoted to some public purpose, while others again went directly to meet specified charges [3]. The Commissioners of Public Accounts [4] recommended that the customs should be simplified; the entire revenue thence arising was henceforth paid into one Fund, called the Consolidated Fund.

Consolidation of 1787.

Since 1787 new tariffs have been enacted, and new consolidation Acts passed. The principles on which our modern financial policy has in this respect been based, are mainly

Modern principles.

[1] 12 Car. II, c. 4.
[2] 27 Geo. III, c. 13, s. 52.
[3] Thirteenth Report of the Commissioners of Public Accounts, p. 51.
[4] Appointed under 20 Geo. III, c. 54.

two: one is to simplify and cheapen the collection of the revenue by reducing the number of commodities on which duty is chargeable: the other is to encourage our manufacturing interest by the abandonment of taxes on raw material imported into this country for the purposes of manufacture.

Reduction of duty-paying articles.

The simplification may be said to have been initiated by Sir Robert Peel. When he came into office in 1842, the customs included about 1,200 articles. In one year, 1845, he struck 450 off the list[1]. The reduction has gone on almost continuously to the present day. For a while during the South African war recourse was had to new sources of revenue, but these are now abandoned, and great financial authorities begin to doubt whether we have not unduly narrowed the basis of our revenue from this source. Be this as it may, the number of duty-paying articles has shrunk from 1,200 in 1842 to about fifteen at the present time.

§ 2. *The Excise.*

The Excise under the Commonwealth.

Duties on articles of consumption produced at home were first introduced under the Commonwealth. After some murmuring at the novelty of the tax, and at its incidence upon things of daily use, it was accepted as both productive and fair. The duties at that time extended not only to articles produced at home, but to certain articles imported from abroad, which were thus taxed twice over, first at the ports in accordance with the Book of Rates, and again while in the hands of the merchant on their way to the consumer.

Resettlement at the Restoration.

When the revenue was settled on the Restoration of Charles II, it was necessary to provide the King with a source of income which should meet the loss occasioned by the abolition of military tenures.

It was impossible to devise a tax which, without unfairness to individuals, should fall upon the lands heretofore held in chivalry. A general land-tax would have borne hardly

[1] 8 & 9 Vict. c. 12.

on those who had not been tenants-in-chief, or tenants in chivalry: a tax limited to lands so held would not have been fair to purchasers during the Commonwealth who had bought lands which they supposed to have been for ever freed from liabilities of this nature.

The hereditary Excise,

An excise duty on beer and other liquors, although it did not correspond either in character or incidence to the source of revenue which was abandoned, seemed to be a just and reasonable method of raising money: it was one to which the taxpayer had become accustomed in the days of the Commonwealth. An excise duty was therefore imposed by 12 Car. II, c. 24, and was made a part of the hereditary revenues of the Crown. A duty similar in character and amount was imposed at the same time and granted to the Crown for life.

But after the Revolution the King was no longer entrusted with the maintenance of all the services of the country. He was then granted only such a sum as would suffice to maintain the Civil List; and the hereditary excise, with the other hereditary revenues, diminished *pro tanto* the need of a supplementary grant from Parliament to make up the amount at which the annual cost of the Civil Service was estimated. At the commencement of Anne's reign, the right of the Crown to alienate the hereditary revenues was limited by the Statute which granted a Civil List to the Queen[1].

Commuted,

In 1736 a portion of this income was commuted by Parliament for an annual payment to the Crown of £70,000. In 1787 by the Consolidated Fund Act, already referred to, all existing excise duties were repealed, and therewith the hereditary excise. New duties were imposed of a similar character, and their produce carried to the Consolidated Fund, but a calculation was made every year of the amount which the hereditary excise would have produced.

Surrendered,

Without going into the detail of the Statutes on the subject it is enough to say that, although each successive sovereign since George III has surrendered his right to the

[1] Anne, st. i. c. 7, s. 3, 7.

hereditary revenues in consideration of a fixed annual payment, the hereditary rights of the Crown are kept alive, while provision is made that the income of which they are the subject should, as in the case of Crown lands, go to the Consolidated Fund, or, as in the case of the hereditary excise, should not be raised at all[1]. Extinguished.

The articles on which excise duties are now levied are not numerous, but include beer and spirits which, together, produce more than a quarter of the national revenue. But I would point out some extension of the term beyond its original meaning of a tax upon articles of use or consumption produced at home. Use of the term Excise.

The term was used to excite popular feeling against a very useful measure, the celebrated Excise Bill of Sir Robert Walpole. His scheme was nothing more than a mode of collecting the customs on wine and tobacco which had been already applied to tea, coffee, and cocoa. Instead of taking the whole duty upon the landing of the goods, Walpole proposed to take a small duty upon unshipment, after payment of which the goods were required to be warehoused. If they were exported thence, no further duty was demanded; if taken out for consumption at home, a sum which made up the full duty was to be paid, and this duty was to be collected by the officers of Excise. This term, which had reference solely to the mode of collection, was used by the leaders of an unscrupulous opposition as describing the character of the tax. People were told that a multitude of Excise officers would penetrate every household and take toll of every article of use or consumption. The clamour raised determined Walpole to withdraw a measure the only fault of which was that it was called by an unpopular name. The Excise Bill of Walpole.

But the modern use of the term Excise is largely extended beyond its original meaning. The tax does not Excise licences.

[1] These duties on ale, beer, and cider, were dealt with by 11 Geo. IV and 1 Will. IV, c. 51, but in the Civil List Act of William IV, the hereditary rights in question were surrendered to the public, with a provision, repeated in 1 & 2 Vict. c. 2, that if the successor to the throne should so desire they should revive. No such desire has been expressed by His Majesty King Edward.

include customs duties in any form: so far as it falls on commodities, it falls on commodities made or prepared in the United Kingdom. But under the head of Excise appears a great variety of licences, for the grant of which money has to be paid to the Inland Revenue. Some of these licences are licences to sell commodities or to carry on a trade: the bulk of them are known as Establishment licences, and were formerly known as Assessed Taxes. They are in fact demands made by the State upon the citizen to pay for enjoyment of certain things of convenience or luxury, on the assumption that such enjoyment represents wealth which should thus be called upon indirectly to contribute to public needs. To employ a male servant, to keep a carriage, to use armorial bearings, may be taken to show that one who can afford these ornaments or comforts is able to assist the revenue. Before 1869 the system was to make the taxpayer pay for what he had enjoyed in the preceding year. In 1869 the Assessed Taxes were abolished *eo nomine*[1]. The taxpayer is now required to take out a licence for his existing establishment at the commencement of each year, and additional licences as the year goes on if his establishment should be increased.

§ 3. *Estate Duty.*

This is a general term for duties levied on property in course of devolution, and these are often described as the death duties. They include (1) a charge on the whole estate of a deceased person, real and personal, and this is the Estate duty strictly speaking, (2) succession duty to realty, and (3) legacy duty payable in respect of bequests of personalty.

§ 4. *Stamps.*

A stamp-duty is a convenient mode of levying a tax upon property in course of devolution, just as a licence is a convenient mode of taxing property the existence of which is indicated by the use of luxuries.

[1] 32 & 33 Vict. c. 14, part v.

Stamps and licences.

The two modes of taxation cannot fail to overlap. Whether a receipt for a tax imposed by the legislature is given in the form of a stamp or a licence must in many cases be immaterial. It would seem to be of no great importance whether the receipt for the *ad valorem* duty levied on the estate of a dead man is in the form of a licence to take out probate of the will, or a stamp affixed to an inventory of the dead man's estate. Nor would it matter that instead of a licence to keep a dog or kill game a stamped receipt for the money required to be paid was given to the payer. In fact, the distinction between stamp duties and other modes of taxing is not a difference in kind. It does not affect the incidence of taxation, but only the mode of collection. A certain amount of the money paid by the taxpayer must always go to the cost of collecting it, and it is the business of Government to diminish as far as possible the cost of collection. There are certain transactions which represent transfers of credit, or creations of liability which it would be difficult to tax otherwise than by requiring a stamp for their validity. But where the legislature demands from the heir a tax bearing a certain proportion to the property which he acquires by succession, the arrangement that the stamp affixed to the receipt of the money should indicate the amount paid, is merely a matter of convenience in collecting the revenue.

Division of Stamp duties.

The stamp duties must now be regarded as distinct from the death duties; these, though a stamp is made the means of collection, are in effect a tax on real and personal property in the course of devolution; while the stamp duties proper are levied upon a miscellaneous set of legal transactions which need a stamp for their validity.

The first stamp duties.

The first general Stamp Act was passed in 1694, when commissioners were appointed to prepare the stamps and collect the revenue thence arising. The value of the stamps ranged from £2 to 1*d.*, and the documents requiring to be stamped were forms of admission to offices or degrees, marriage certificates, certain writs, affidavits, copies of wills, pleadings and depositions, probates of wills and letters of

administration, documents under seal, and contracts not under seal [1].

Their extension.

These duties were increased from time to time, and additions were made to the documents which required stamps for their validity. Bills of exchange and promissory notes were brought within the Stamp Acts in 1782, ordinary receipts, for money paid, in 1784. The principle of taxing documents not according to their length, but according to the value of the transaction which they embodied, was of very gradual application. Introduced at first in the case of grants to offices in 1714, it was applied to receipts when they were first taxed in 1784, was extended to bonds in 1797, to mortgages in 1804, to conveyances by way of sale in 1808, to settlements in 1815.

In 1853 the application of the *ad valorem* principle to receipt stamps having proved onerous in practice, was abandoned, and a penny stamp made necessary for all sums of £2 or upwards. In 1881 the stamp so required was made uniform with the postage stamp, the Post Office handing over in each year to the Inland Revenue Department its share of the produce of the stamp.

§ 5. *Taxes.*

Taxation and hereditary revenue.

The early history of taxation in this country is difficult to disconnect from the history of the hereditary revenues of the Crown, for the earliest contributions of the country to the maintenance of a Court, and to the needs of self-defence, seem to have grown into matters of hereditary right, and then dwindled until it became necessary to find fresh sources of revenue. Kings were apt to treat these contributions either as Crown property, or as sources which might be drawn upon at will. The nation desired to define precisely the revenues which might be regarded as Crown property, to require the King to 'live of his own'; if more was required, to apply to the Commune Concilium Regni, or later to Parliament, for a grant in aid of his revenues; and

[1] 5 & 6 Will. & Mary, c. 21.

to apply the money so granted to the purpose for which it was intended.

Taxes in Saxon times.

The Saxon king conducted the business of the country with funds provided from the income of the royal estates and of the folkland, and from the produce of the *feorm fultum* due to him for the maintenance of his Court, sometimes rendered in kind, but more usually commuted for money. To this must be added a tax which the Danish invasions made necessary for the defence of the country, the Danegeld, a charge of 2*s.* on every hide of cultivated land.

Under the Norman kings.

Under the Norman kings the royal estates and the folkland became alike the property of the Crown, the *terra regis*: the King had therefore a more immediate command of the income thence arising. He retained the *ferm* of the shire, which now took the form of a composition for royal dues. The Sheriff became responsible for the collection of this sum in each shire, and for its payment into the Exchequer [1]. The Conqueror increased the Danegeld from 2*s.* to 6*s.* on the hide, and required an analogous payment from the towns. The Norman kings, as supreme landlords, enjoyed in addition the proceeds of feudalism, reliefs, aids, and the incidents due on military tenures. They made the administration of justice a source of revenue, from fines due on Pleas of the Crown, and payable through the Sheriff.

The new taxes of Henry II.

In the reigns of Henry II and his sons new forms of taxation arise. The *ferm* of the shire and the Danegeld had long been compounded for by the Sheriff at a fixed sum. They now disappear, except where some items remain among the hereditary revenues of the Crown. The taxation of Henry II, apart from these sources of revenue, was of three kinds, one falling exclusively upon the holders of land in chivalry, another upon all holders of land, a third upon all holders of property of any sort.

Scutage.

The first of these was the scutage, or composition for military service, at the rate of 20*s.* for each knight's fee.

Aid.

The second was a substitute for the earlier Danegeld.

[1] Stubbs, Const. Hist. i. 380, 383.

Under the various names of *donum, auxilium*, or carucage, it fell upon all land, and was computed by the hide, or later by the carucate of 100 acres. Where a payment of this nature was demanded by the King, the towns did not escape [1]: those which had bought immunity from the jurisdiction and assessment of the shire paid a fixed composition [2]; others compounded on each occasion with the officers of the Crown [3].

These are the two forms of taxation referred to in Magna Charta, where the King promises to levy no scutage or aid, other than the three feudal aids, save with the assent of the Commune Concilium. The third form of taxation fell upon all owners of rent or chattels. It was a tax of a tenth or some other proportionate part of such property. It first appears in the Saladin tithe, but, as the country became wealthier, personal property became a more fruitful subject for taxation, and in the thirteenth, fourteenth, and fifteenth centuries the tenth and fifteenth, which had become the common form of charge on town and shire respectively, became the usual mode by which the representatives of the Commons in Parliament met the needs of the Executive as represented by the Crown.

Taxes on personalty.

Before going further into modes of taxing real and personal property, let us note at once the statutory limitations on the powers of the Crown to levy taxes of this sort without consent of Parliament. A tax on movables would not be included under the term scutage or aid used in the Charter, but Parliament in its earliest days was prompt to close this door to royal acquisitiveness. The Confirmatio Cartarum dealt with *aids, tasks, and prises* generally, and contained a promise by the King that such charges should not be made 'but by the common assent of the realm.'

The king's right to tax.

The Confirmatio Chartarum.

The demesnes of the Crown still offered a wide field for arbitrary taxation, especially the towns in demesne. They were, in fact, the debateable ground between hereditary revenue and parliamentary grant. But after some years of royal exaction and parliamentary remonstrance a

The royal demesnes and the Statute of 1340.

[1] Stubbs, Const. Hist. i. 580, 584. [2] Ib. 584, 625. [3] Ib. 585.

Statute of 1340 provided against the nation 'being charged or grieved to make any common aid, or to sustain charge, except by common assent in Parliament[1].' The year 1332 was the last in which the King tallaged his demesnes[2].

The Petition of Right.

The forced loans and benevolences of the sixteenth century, and the violent and illegal taxation of James I and Charles I, were met by the Petition of Right, which was conclusive against the legality of direct taxation in any form without consent of Parliament. The Bill of Rights declares in general terms the unlawfulness of levying money 'for and to the use of the Crown by pretence of prerogative for other time and in other manner than the same was granted by Parliament.'

The Bill of Rights.

Forms of taxation.

To return to the forms of taxation. The old taxes, the scutage, and the aid cease in or about the middle of the fourteenth century; their place is taken by taxes on movables, and the customs duties of which I have already spoken. The taxes on movables assume the form of a fifteenth from the shire and a tenth from the borough[3], the tenth and fifteenth being reached by an assessment of cattle and crops, of chattels and stock-in-trade. But in 1334 a calculation was made by which the grant was estimated to produce £39,000, and henceforth the grant of a tenth and fifteenth meant a grant of £39,000 divided in certain proportions among the shires and boroughs. The form of the grant provided for an assessment of movables which, as a matter of fact, never took place.

The 10th and 15th.

The subsidy.

As the property on which the tax was supposed to be levied was never re-valued after the middle of the fourteenth century, the tenth and fifteenth became in process of time an unfair tax. It lingered on as an occasional mode of raising money into the seventeenth century, and the last grant of this kind was made in 1623. Its place was taken in the sixteenth and seventeenth centuries by the subsidy. Subsidy in this sense must be distinguished from the subsidy which meant those export and import

[1] 14 Ed. III, st. 2, c. 1.

[2] Stubbs, Const. Hist. ii. 520.

[3] Borough meant parliamentary borough: this was one cause of the reluctance of boroughs to be represented in Parliament.

duties which were called tunnage and poundage, and from the more general use of the term to mean a grant in aid of the ordinary revenues of the Crown. The subsidy of the sixteenth and seventeenth centuries meant a charge of 2*s.* 8*d.* in the pound on movables and 4*s.* in the pound on land[1]. A grant of an entire subsidy meant this, and several subsidies were sometimes granted at one time. Except during the Commonwealth this was the ordinary form of taxation until 1663, the clergy taxing themselves apart, though after 1533 the separate subsidies granted by the clergy were required to be submitted for confirmation to the Crown in Parliament. In 1664 the clergy gave up the practice of taxing themselves apart from the laity; at the same time taxation by subsidy was abandoned. The assessment of the taxable property seems to have been conducted with such unfairness or so little care that the poor man paid as much as the rich; and in 1663, when clergy and laity granted each four subsidies, the total amount produced was no more than £282,000.

After the year 1663 we hear no more of the subsidy as a mode of raising money. The ministers of Charles II had recourse to three other forms of direct taxation.

The poll-tax.

The first of these was a poll-tax, a charge of so much per head on each individual above sixteen years of age. The tax had been employed from time to time from 1377 onwards. It was never popular, and was imposed for the last time in 1698, expiring in 1706.

Hearth-money.

The second was hearth-money, a tax on all houses but cottages at a rate of 2*s.* for every hearth or stove. This was imposed in 1662: like the poll-tax it was 'grievous to the people,' and was repealed in 1689.

The assessment.

The third was the raising of a fixed sum divided among towns and counties, for every month, by an assessment of the value of all real and personal property in the places on which the contribution was levied. The practice began during the Commonwealth, and was adopted after the Restoration as a more effectual means of raising money

[1] Dowell, vol. i. p. 194. But the amounts varied from time to time.

than the subsidy. Though more productive than the subsidy, it was not a great success. The largest amount raised was rather more than a million and a half in the year, but complaint was made that personal property did not bear its fair share of the burden, and the practice ceased after 1691.

The Land tax

Personal property proved no less elusive to the revenue when, in the following year, the last attempt was made to lay a fixed and permanent charge upon all property, real and personal. The so-called Land tax of 1692 was, in effect, a subsidy at the rate of 4*s.* in the pound on real estate, offices, and personal property. The amount produced by this tax diminished year by year, till in 1697 Parliament gave up all hope of obtaining a fair return for the rate voted, fixed the sum that a rate of 1*s.* in the pound ought to produce, and apportioned the money to be raised among the towns and counties of the kingdom. Personal property and offices were to be rated as well as land, but since it was provided that the land should be liable for what the other sorts of property did not produce, the charge in the end fell wholly upon land.

a tax on personalty, but evaded.

Settlement of the land tax in 1798.

The tax fluctuated between 1*s.* and 4*s.* in the pound for just 100 years, and then in 1798 it was made perpetual by Mr. Pitt at the rate of 4*s.* in the pound. It thus became a permanent charge on the land in the proportion fixed by the assessment of 1692, and provision was made for its redemption by persons interested in the land on which it fell. The charge upon personalty, which had always been evaded, was dealt with as a separate tax annually granted. It does not seem to have come to more than £150,000, and was repealed in 1833. The tax on offices and their profits, after undergoing various modifications, was repealed in 1876.

The land tax, or so much as is unredeemed, remains a source of revenue, and a survival of a mode of taxing which depended for its efficiency upon a constant re-valuation of the real and personal property of the country, just as did the older taxes, the tenth and fifteenth, and the subsidy. Such a re-valuation was never carried out,

and every one of these taxes in turn became a fixed charge apportioned among towns and counties. The modern attempts to tax property begin with the Assessed Taxes of 1797, and the forms which such taxation has taken, and now follows, are four.

Modern taxation of property.

Income tax.

House duty.

Death duties.

The first is a tax on income, whether derived from property in land, capital invested in business, skill, or learning exercised in a profession. The second is a charge on inhabited houses, which, with various changes, has been levied since 1778. The third is a tax on property in the course of devolution, devolution from the dead to the living, falling on real and personal property, whether acquired by inheritance or disposition. Estate duty, legacy duty, and succession duty, now known collectively as the death duties, are in effect stamp duties. The fourth is a charge on apparent wealth, indicated by the use of certain articles of enjoyment: the taxes of this nature were until lately grouped under the head of Assessed Taxes, and are now collected in the form of excise licences.

Assessed taxes.

The income and property tax was first imposed by Pitt in 1799. It was then a graduated tax on incomes of from £60 to £200 a year, and a tax of 10 per cent. on all incomes above £200. It was dropped in 1802, revived in 1803 at the rate of 5 per cent. on all incomes of £150 and upwards, and was increased from time to time until its repeal in 1815. The tax was revived again by Sir Robert Peel in 1842, at the rate of 7*d.* in the pound, and has continued in existence at varying rates ever since. It falls upon incomes the sources of which are classified as (1) rents and profits arising from property in land, (2) profits arising from the use or occupation of land, (3) investments in the public debt or liability of our own country, its colonies, or any foreign state, (4) the exercise of a profession, trade, or other occupation, (5) employment by the State, or in any corporation or company.

The Income tax.

Of these four modes of taxing property, the income and property tax and the inhabited house duty alone come under the head of *taxes*, for the *death duties* are levied by means of stamps, and the *assessed taxes* are now excise licences.

§ 6. *Post Office and Telegraph Service.*

The Post Office as a source of revenue dates from the reign of Charles II, though James I deserves the credit of having started a post office to foreign countries for the convenience of English merchants, and Charles I, in 1635, made arrangements for the transmission of letters in England and Scotland, fixing the rates of postage by royal proclamation. The business was entrusted to a Postmaster, who took the risks and profits of the undertaking. In 1660 the Post Office was organized and privileged by Statute [1], and its proceeds made part of the hereditary revenues of the Crown, and in 1663 its revenues were settled in perpetuity on the Duke of York [2]. In 1685 they were again settled on James II as *king*, his heirs and successors. In 1710 the Post Office was again remodelled, and an appropriation of its income made between the civil list and the public service. Since 1760 the hereditary revenues thence arising have been merged in the general revenue, under the Civil List Acts, and since 1787 have been paid into the Consolidated Fund.

The Post Office in the 17th and in the 18th century.

The extent of postal operations has varied much at different times. The Post Office began, in the reign of James I, as a means of communication for English merchants trading in foreign countries; it continued to undertake foreign postage throughout a great part of the wars of the reign of Anne, conveying not only letters but articles of a very varied sort [3]. In 1710 its operations were contracted and systematized. A Post Office was provided for Great Britain, Ireland, and the Colonies, and a Postmaster-General appointed to superintend the whole, the office

Extent of its operations.

[1] 12 Car. II, c. 35. [2] 15 Car. II, c. 14.

[3] The following are examples of these consignments:—

Fifteen couple of hounds going to the King of the Romans with a free pass.

Dr. Crichton carrying with him a cow and divers other necessaries.

A box of medicines for my Lord Galway in Portugal.

Two servant maids going as laundresses to my Lord Ambassador Methuen.—See Return on Public Income and Expenditure, 1869, Parl. Papers 1868–9 (366), part ii, p. 428.

having previously been carried on by one or more persons under the superintendence of a Secretary of State.

Their variety.

The extension of the operations of the Post Office is a part of our social and economical history. The department undertakes upon certain terms to convey by post letters, newspapers, books, parcels, and patterns or samples; it transmits communications by telegram; it transmits cash by means of money orders and postal orders; it receives and takes care of small savings, and has thus a banking establishment which is responsible for more than £152,000,000; it acts as an office for insurances on life for sums within the limits of £5 and £100, for the purchase of annuities within the limits of £1 and £100, for investments in Government stock to an amount not exceeding £500.

Its income.

The Post Office is therefore not merely a means of communication throughout the United Kingdom and the Colonies: it is also a means of bringing the appliances for thrift within reach of the poor. The growth of its income should be noted. In 1838, the last year before the general reduction of charges, the net income was £1,676,522, the cost of management amounting to £669,756; in the financial year ending March 31, 1869, it was £2,176,660, the cost of management amounting to £2,376,920; in the financial year ending March 31, 1907, the cost of management (including that of the Telegraph service) amounted to £17,374,251, and the amount paid into the Exchequer £17,880,000. The Telegraph service cost £3,754,793 out of the above-named sum, and brought into the Exchequer £4,420,000, but against this must be set the interest of the money invested in the purchase of the property of the Telegraph Companies.

Its privileges.

The exclusive privileges of the Postmaster-General as regards the conveyance of letters rest on 1 Vict. c. 33, s. 2; as regards the transmission of messages by telegraph [1], on 32 & 33 Vict. c. 73, s. 4.

[1] The Telegraph Act of 1863 defines a telegraph as 'a wire used for the purpose of telegraphic communication,' and this definition has been held to include a telephone. *Attorney-General* v. *Edison Telephone Co.*, 6 Q. B. D. 248.

§ 7. *The Crown Lands.*

The Crown Lands are the only source of the hereditary revenues of the Crown which we need consider, though it may be well to bear in mind that there are other sources of hereditary revenue which are not now collected, or which are surrendered to general or specific purposes[1]. The net produce of such of the Crown lands as are part of the general revenue of the country, amounted in 1894 to £410,000, in 1907 to £520,000. These lands include all the hereditary landed property of the Crown except the Duchies of Lancaster and Cornwall, which remain a source of private income to the King and the Prince of Wales respectively.

The rights of the Saxon king;

Before the Conquest the King had rights over land of three sorts. He held lands of his own, his private property; he held lands in right of his kingship, demesnes of the Crown; he enjoyed rights over the folkland, of a somewhat uncertain character, but including certainly an initiative in granting portions of it to individuals or corporations: to the exercise of this right the Witan were legally parties, though under the later Saxon monarchy their share in making the grant was merely formal.

of the Norman.

After the Conquest these three rights of the Crown merge in one, the right of the King over the Crown lands. The feudal King is the lord of the land, of whom all estates are mediately or immediately held. All land, therefore, which is not held by the tenants-in-chief or their vassals is the King's; the folkland, the reserve of national property, becomes the *terra regis*. Feudalism, which thus extended the rights of the Crown, provided also in the rules of escheat and forfeiture a means for their further extension. But at the same time the King ceases to be a private owner. The lands which he holds he may use for the maintenance of his own power, or for the security of the nation; he may sell them or give them away, but he

[1] These are the hereditary excise, the hereditary post office duties, and some smaller branches of hereditary revenue, for which see Return, 1869, part ii, pp. 456, 457.

can hold no land except as King; his property is inseparably associated with public duty.

The Duchy of Lancaster.

An illustration of this rule is found in the fate of the Duchy of Lancaster, the private property of Henry IV before he ascended the throne. An Act of Parliament was needed to prevent the merger of the Duchy in the Crown lands, an Act obtained in the first instance by Henry IV, repeated with somewhat different provisions by Edward IV, and re-enacted from time to time until the present day. In times when the succession was in dispute, it is not difficult to understand the desire of the King to secure the property of his family to himself and his heirs.

Parliamentary supervision.

A result of this rule may be seen in the constant supervision exercised by Parliament over the grants of land made by the King. The history of the royal seals indicates the desire to prevent the making of improvident grants; and if, in spite of these precautions, improvident grants were made, Parliament not unfrequently required their resumption. The history of the Crown lands is therefore one of constant fluctuation in extent and value. Escheats, forfeitures, and the seizure of the estates of religious houses, increased the property of the Crown. Profuse grants to courtiers and favourites, sales made, as by Elizabeth, to save the taxpayer, or, as by Charles I, to avoid a summons of Parliament, reduced that property, till during the reign of William III its income was estimated at £6,000 a year.

But Parliament, after the Revolution, was determined to control the amount and manner of the expenditure of public money. The sum to be placed at the disposal of the King was limited, and the objects on which money should be spent were marked out in the Civil List. It was estimated that a part of that sum would be provided by the income of the Crown lands, and Parliament could not allow the King to falsify this estimate by alienating at his pleasure the sources of the income calculated upon.

The Civil list.

When Anne succeeded to the throne, the Act which settled the revenue for her reign restrained the Crown, for that

and all future reigns, from alienating the Crown lands. During three reigns the Crown lands formed a constituent part of the Civil List. The hereditary revenues were supplemented by Parliamentary grant calculated to produce the amount which would enable the King to maintain his Court and pay the Civil services. The Crown lands could not be diminished by alienation, but they might fluctuate in value, and this introduced an element of uncertainty into the calculations of Parliament. George III on his accession surrendered to Parliament his interest in the Crown lands for his life, receiving in return a Civil List of a fixed amount, and his successors have followed his example as to the land revenues of the Crown in England and Wales. Since the beginning of the reign of George IV the same practice has been adopted with regard to the land revenues in Scotland and Ireland.

Crown lands and Civil List.

§ 8. *The Revenues of Scotland and Ireland.*

The revenues of Scotland and Ireland call for a brief notice. At the time of the union with Scotland the Crown had certain hereditary revenues corresponding in character to those of the English Crown, and consisting in part of the rights of a feudal lord, in part of income arising from customs and excise and the Post Office, annexed to the Crown by Acts of the Scotch Parliament.

The receipt and issue of the revenue took place in the Scotch Exchequer, and the Court of Exchequer controlled the accounts of the Treasurer and Great Chamberlain, the officers of state responsible for the collection of the revenue. The Act of Union constituted the Scotch Court of Exchequer not merely a Court for the decision of revenue cases, but an office in which the collectors of the revenue presented an account of their receipts; this, when allowed by the Court, was passed on to other officers till a discharge was ultimately obtained at the Pipe Office. But in 1832 all powers and duties relating to the administration of the revenue were taken from the Exchequer and transferred to the Treasury at Whitehall.

The Scotch Exchequer.

Taxation of Scotland.

The financial settlement between England and Scotland at the Union provided that, with certain exceptions as to the operation of existing taxes, the same customs and excise duties should be levied in both countries. Stamp duties were extended to Scotland by 10 Anne, c. 19, and uniformity of postal arrangements was established by 9 Anne, c. 10. Taxation is uniform for the two countries, and since 1822 no distinction has been made between their revenues in the finance accounts of each year.

The revenue of Ireland.

In Ireland, as in England, the Crown had certain hereditary revenues, and the proceeds of certain taxes, customs, and excise duties granted from time to time by the Irish Parliament. But it is not necessary to trace the history of the revenues of Ireland, of its financial staff, or of its public debt. By the terms of the Union with England in 1801 these were kept distinct, but provision was made for their consolidation in certain contingencies. This consolidation was effected in 1817, when the offices of Lord High Treasurer of England and of Ireland were united, the revenues of the two countries brought into one fund, charged with the payments of the National debts of the two countries, which were henceforth to be treated as one[1]. The subsequent changes of 1834 and 1866 as to the Exchequer offices, as to the mode of controlling receipts and issues, and the audit of accounts, have consequently been applicable alike to Ireland and to England.

Section II

Collection and Expenditure of Revenue

Introductory.

In order to understand so much as it may be needful to state of the history of this subject, it will be well to summarize the practice of the present day in the collection and expenditure of the revenue and the audit of the national accounts.

[1] This was under the provisions of 56 Geo. III, c. 98, which took effect on the 5th January, 1817.

Collection of Revenue.

The revenue is collected by four great departments; the Customs, the Inland Revenue, the Post Office, and the Commissioners of Woods and Forests. Other departments receive moneys directly or indirectly in the course of their business from fees, the sale of old materials, or similar sources. Sometimes these are used by the department as 'appropriations in aid' of the amount granted by Parliament to meet departmental expenditure. Sometimes they are paid into the Exchequer and then fall under the head of revenue described in the Finance accounts as 'miscellaneous.'

Revenue paid into Consolidated Fund.

Every sum received by these departments is paid into the Consolidated Fund of the United Kingdom; that is to say, it is paid to the credit of the Exchequer account at the Bank of England; or, in Ireland, at the Bank of Ireland. From this fund nothing is paid except by Parliamentary authority. When the authority of Parliament has been given, the King directs issues to be made in pursuance of it by an order to that effect countersigned by two Lords of the Treasury.

How issued.

But this order is not of itself sufficient to procure an issue of the money for the objects specified by Parliament and the King. It empowers the Treasury to call upon the Comptroller and Auditor-General to give to the Lords of the Treasury a credit on the Exchequer account at the Bank. When this credit is given the Bank is requested to transfer the sums specified to the account of the Paymaster-General, and the Paymaster-General is thus enabled to make the payments required by the several departments in accordance with the votes of Parliament. So far security is taken that money voted by Parliament is issued for the purposes indicated by Parliament; it remains to secure that the money is not only issued but spent in accordance with the votes.

Control of issue.

Audit of accounts.

So we must note that the Comptroller-General is also the Auditor-General. In that capacity he must satisfy himself by an examination of the accounts, either periodical or concurrent during the financial year, that the payments for which he has given credit are not merely

spent on the public service, but have been spent on the services for which he set free the Exchequer balance; that is, for the services specified by Parliament. If not satisfied on this point he must report the facts to Parliament in detail. When the House of Commons receives the departmental accounts of the expenditure on the several votes, together with the Comptroller and Auditor-General's report thereon, they are referred to the Public Accounts Committee, which in its turn reports to the House. Thus the circle is complete: the House which voted money for certain purposes receives full information as to the expenditure of the money on those purposes.

Completeness of Parliamentary control.

§ 1. *History of the Exchequer Offices.*

With this brief outline of the present mode of receipt and expenditure of the public money in our view, we may go back and trace the older system of the Exchequer[1].

Money used to be paid into Exchequer.

It must be borne in mind that until comparatively recent times the various collectors of revenue actually paid the sums collected by them into the Exchequer, where the money was kept in the Tellers' offices until it was required for public service. The sheriffs were, in the early days of the Exchequer, the great collectors of revenue. In time their functions in this respect vanished before new sources of revenue and new modes of collection, but the Exchequer of Receipt remained the storehouse to which and from which the public money came and went.

Later into the Bank of England.

Late in the eighteenth century it became the practice to make these payments into and out of the Bank of England; but every day and all day they were accounted for, as made, to the Exchequer, and in the evening the Tellers' chests were opened, and money was paid in or taken out as the balance might be in favour of the Exchequer or adverse to it[2].

[1] The reader who is interested in this part of our constitutional history should refer to The Antiquities of the Exchequer, by Mr. Hubert Hall.

[2] Return Public Income and Expenditure, 1869, Parl. Papers 1868-9 (366), part ii. pp. 342, 343. See too Recollections of a Civil Servant, Temple Bar Magazine, Feb. 1891, at p. 209.

As I shall frequently have to refer to the Return of 1869, I shall for brevity's sake refer to it thus, Return, 1869, ii.

The Norman Exchequer was divided into two Courts: the Upper or Exchequer of Account, the Lower or Exchequer of Receipt. The Upper Exchequer, consisting of Treasurer, Chancellor, and other great officers, the Barons of the Exchequer, exercised a control over all persons who collected or expended the royal treasure. Accounts were here audited and those legal questions relating to revenue were here determined which gave its original jurisdiction to the Court of Exchequer. But the Lower Exchequer or Exchequer of Receipt is that which has most interest for us. The Norman Exchequer.

The Upper Exchequer developed in two directions. Its revenue jurisdiction, extended by fictions, made it into a great Common Law Court, severed except in a formal sense from the ancient Exchequer. Its duty as a place of account and audit was discharged with less and less efficiency, till at the end of the eighteenth century the lucrative sinecures which purported to be offices of audit were abolished, and the duty of auditing the public accounts was assigned to a body which has no historical connexion with the Exchequer of Account. The Exchequer of Account.

As some of the King's revenue was paid at the King's palace, 'in camera regis [1],' the Chamberlain was, with the Treasurer, a chief officer of the Exchequer of Receipt. The Chamberlain's office broke up into three: the hereditary sinecure office of the Lord Great Chamberlain, the King's Chamberlain, and the Chamberlains of the Exchequer. The Exchequer of Receipt; its officers;

Payments out of the Exchequer were made in pursuance of a royal order under the Great or Privy Seal, usually addressed to the Treasurer and Chamberlains. its procedure in payment;

Payments into the Exchequer were recorded by the Treasurer's chief clerk and the two Chamberlains.

The payer of money into the Exchequer received a tally, or one half of a notched stick split down the middle; the notches corresponded to the amount paid, and that amount

[1] Madox, cited in Return, 1869, ii. pp. 340, 341, and see Stubbs' Const. Hist. ii. 276, as to the confusion, in the fourteenth century, of the household and the national accounts.

was also written at the side. The other half was kept at the Exchequer. Similar tallies were given to persons who were entitled to receive money from the Exchequer, where it was intended that they should obtain the money from some public accountant on its way to the Exchequer. The first sort of tally was called a Tally of *Sol*, the second a Tally of *Pro*[1].

These tallies were in use until 1826, when, by the death of the last of the Chamberlains, an Act passed forty-four years earlier came into operation[2], and their use was discontinued.

in account.

The ancient process of the Exchequer was simple. Three officers, the Treasurer's clerk and the two Chamberlains, kept three separate accounts of money received; they paid out money due under orders properly authenticated from the Crown, and kept a similar triple record of money so paid. These last were called pells of issue, or parchment rolls on which the money paid out was entered. The accounts of each officer were compared with those of the other two, daily, weekly, half-yearly.

Changes of 16th century.

In the reign of Henry VII this record of issues was discontinued, but that of receipts was still made, for a century in triplicate, afterwards by one of the Treasurer's clerks.

The Tellers.

The issue and record of issue of public money was placed in the hands of four new officers, the Tellers of the

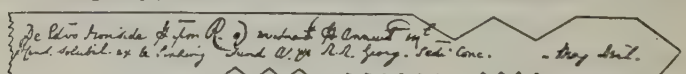
[1] The scale of notches was as follows :—

$1\frac{1}{2}$ inch, £1000.

1 ,, £100.

$\frac{3}{8}$,, £10; a half notch of this size denoted £1.

$\frac{3}{16}$,, a shilling; the smallest notch a penny; a small round hole a halfpenny; a cut of a notch denoted half the amount.



£236 4*s.* $3\frac{1}{2}$*d.*

[2] 22 Geo. III, c. 82. The rest of their history is not commonplace. The returned tallies were stored in the ancient Star-chamber, which they filled from floor to ceiling. When, in 1834, it was desired to use this room, orders were given to destroy the tallies. They were used as fuel in the stoves which warmed the Houses of Parliament; they overheated the flues, and burned down the Houses.

Exchequer, who accounted to the clerks of the Treasurer for disbursements made.

The Chamberlains.

Of the three parties to the triplicate record of earlier times the Chamberlain's duties dwindled to the preparation and custody of the tallies; but the clerical staff of the Treasurer developed for themselves a new, and, as it proved, a very remunerative sphere of activity.

The Auditor of Receipt.

One of them received and audited the Tellers' accounts, and hence was called Auditor of Receipt; in course of time his concurrence became necessary to the issue of money.

The Clerk of the Pells.

Another, whose duty it had been to write out a pell or parchment of the receipts, obtained authority under the Privy Seal to make a similar pell of the issues. His office, that of Clerk of the Pells, became a record office of all receipts and issues.

Here we have the Exchequer staff down to the year 1834. Four Tellers, who received and paid out the revenue; two Chamberlains, who struck the tallies and examined the two parts to see that they corresponded; a Clerk of the Pells, who recorded all issues and receipts; an Auditor of Receipt, who kept a similar record, and who had important duties with respect to the issue of money.

Use of these offices in the 18th century;

These offices were paid until the commencement of the nineteenth century by fees and percentages; their duties were discharged by deputy, and they formed the great prizes of political life, whereby a minister was enabled to provide for his family.

The names of those who held these offices in 1821 is significant of the objects which they served. The four Tellers were Lord Camden, Lord Bathurst, Mr. Charles Yorke, and Mr. Spencer Perceval; the Clerk of the Pells was Mr. Henry Addington; the Auditor of Receipt was Lord Grenville.

their emoluments.

As the income and expenditure of the country grew the emoluments of these offices became enormous. In 1783 Parliament settled their salaries at fixed sums: £4,000 a year for the Auditor, £2,700 for each Teller; £1,500 for the Clerk of the Pells. The change was to take effect as vacancies occurred; but in 1812 Lord Camden, the last of

the Tellers under the old system, volunteered a surrender of so much of his emoluments as exceeded £2,700 a year. When these offices were abolished in 1834 Lord Camden was still a Teller, and his contribution to the revenue had amounted to £244,000, being the amount of his fees in excess of the statutory payment. He was nearly a quarter of a million the poorer for putting himself on a par with his fellow sinecurists at £2,700 a year.

§ 2. *The Course of the Exchequer.*

We may now study the working of this machine. But we must bear in mind that the Treasurer and the Chancellor of the Exchequer were the officers ultimately responsible; that they were responsible to the King; that the Exchequer was a means of ensuring that the King got his rights, and paid no more than he was obliged to pay; and that the idea of a Parliamentary control over the issue and expenditure of the Exchequer receipts was foreign to the minds of those under whose care the machinery of the Exchequer was elaborated.

Parliamentary control.

The relations of Parliament to the expenditure of the revenue may be said to have passed through three stages.

First stage.

In the first a life-income was assigned to the King, in addition to his hereditary revenues, to be spent as he pleased. So long as the King did not exceed this income Parliament asked no questions. If he wanted more, Parliament was moved to ask where the money had gone, and why more was wanted; but the Commons were more concerned to prevent illegal taxation than unauthorized expenditure.

Second stage.

The second stage begins with the appropriation of subsidies to special purposes in the reign of Charles II. From that time until 1834 Parliament endeavoured through the existing machinery of the Exchequer to secure that money granted for special purposes should only be issued for those purposes, and to construct a system of audit which should secure that the money was not only *issued for* but *expended upon* those purposes.

Third stage.

The third stage begins with the year 1834, when the old offices were abolished and a system commenced, ending in the legislation of 1866, whereby the control of issue and the audit of accounts are brought into the same hands, and the result reported to the House of Commons.

First stage.

Legal control over royal action.

Of the first stage I need say little. But it should be noted as a check on the powers of the Crown in administration that the King's command was not enough to authorize an issue of his treasure; that such a command must be authenticated by letters patent or writ under the Privy Seal. And further that the withdrawal of the Treasurer from active participation in the routine of the Exchequer led to a complicated system of Treasury warrants, preliminary to the issue of public money, known as 'the course of the Exchequer,' and strictly enjoined upon the officers for the receipt and issue of public money by 8 & 9 Will. III, c. 28.

Second stage.

Appropriation of supply by Parliament.

The second stage began with the appropriation to certain purposes of subsidies granted to Charles II. It was developed after the Revolution into a complete appropriation of all supplies except the hereditary revenue. Even these were considered as practically appropriated to the Civil List, and were taken account of in the sum assigned to the purposes of the Civil List. From the time that George III surrendered his hereditary revenues no money could be expended without the consent of Parliament. The revenues of the Crown have come to be recognized as public money, as a part of the revenues of the country.

The second stage in working.

So I will endeavour to trace the control of issue and the history of the audit of accounts as they existed between 1688 and 1834.

We must suppose that Parliament has granted certain sums to the Crown to be raised from certain sources, and applied to certain purposes. We must further suppose that the various persons whose duty it is to collect the revenue have duly collected it and paid it into the King's Exchequer. The money is there: how is it to be extracted and applied to the purposes for which the King's ministers have asked for it from Parliament?

Issue of public money.

The process began then, as now, with a royal order, which was an authority for letters of Privy Seal. These were transmitted through the Treasury, together with a Treasury warrant for the issue of the money required, to the Auditor of Receipt. That great personage himself signed an order for payment, and returned it to the Treasury with the warrant. Both documents came back signed by members of the Treasury Board, together with a letter specifying the date at which the money was to be issued, and the fund out of which it was to be paid [1].

The Tellers.

Thereupon the Tellers unlocked one of the four chests, one of which was kept in the room of each Teller. Even this could not be done without the aid of the Auditor and the Clerk of the Pells, for each chest had three locks, and Teller, Auditor, and Clerk each had the key of one. So when the deputies of these three functionaries had opened a chest, and had handed some portion of its contents to an individual payee or to a Bank cashier to be placed to the credit of a department which had an account at the Bank of England, the Exchequer had done its work as regarded that particular *item* of expenditure.

The Auditor,

The Auditor of Receipt was the hinge on which turned the lid of the Treasury chest, for the Act of William III [2] forbade the Tellers to issue money without his order. He was in fact a Controller rather than an Auditor. His functions were to see that money was legally issued, not that it was properly spent.

how far useful.

The value of the office to the public service would depend entirely on the independence of the Auditor in respect of political or party ties, for it would be his duty to resist attempts on the part of the Crown or its ministers to use public money either without Parliamentary authority or for purposes other than those authorized by Parliament.

Lord Grenville as Auditor;

How far the holder of the office took this view of his duties may be learned from the conduct of Lord Grenville. He was Auditor of Receipt from 1794 to 1834, when he held a prominent place in politics as leader of the Whig party.

[1] Return, 1869, ii. p. 343.

[2] 8 & 9 Will. III, c. 28.

In 1806 he became Prime Minister, and proposed to take the office of First Lord of the Treasury. In this capacity he would be responsible for the royal orders and Treasury warrants, the validity of which he would have to consider as Auditor. when Prime Minister;

But he did not propose to resign the Auditorship, and when the incompatibility of the two offices was suggested in the House of Commons it was suggested in a tone of apology lest the objection should savour of constitutional pedantry. Eventually Parliament enabled Lord Grenville to place the Auditorship in the hands of a trustee during his continuance at the Treasury Board[1]; but it is plain that neither he nor his friends saw any incongruity in the tenure by the same man of two offices, one of which involved the giving of orders for the issue of public money, while the other was solely concerned with seeing that those orders were valid.

In 1811 Lord Grenville was in opposition. The party of which he was a leader was extremely anxious that a Regency Bill should be pushed on, and that it should impose the least possible restraint upon a Regent who was supposed to favour the Whigs. The King was mad, and the forms of government, where he was concerned, could only be supplied by a fiction. Parliament had voted £500,000 for the army and as much more for the navy: the money was in the Tellers' chests and the payment was urgently needed. The Lords of the Treasury, acting on the vote of Parliament, sent a warrant for payment to the Auditor, but there was no authority under the Privy Seal, because, while the King was mad, the sign manual could not be obtained to authorize the affixing of the Privy Seal, and the clerks of the Privy Seal had scruples. when in Opposition.

So too had Lord Grenville. When Prime Minister he had thought so little of the duties of the Auditor as a control upon the Treasury that he was prepared to act at once as Auditor and as First Lord. But as a leader of Opposition he awoke to the conscientious obligations of his office. Nothing but a strict adherence to the 'course of the Exchequer' would

[1] Cobbett, Parl. Debates, vol. vi, p. 149.

satisfy him. He had the law on his side, and he was able to hurry on the Regency Bill, to inconvenience his political opponents, and finally to obtain a resolution of both Houses which satisfied his conscience in doing what the needs of the public service demanded [1].

One must infer from the tenure of the Auditorship by Lord Grenville that the system of control down to the year 1834 was not very valuable as an administrative check, though it might serve the purpose of political obstruction.

§ 3. *Changes between* 1688 *and* 1866.

We have now dealt with the process of issuing public money and the securities offered by the 'course of the Exchequer' that money was not issued save for purposes authorized by Parliament.

We must next inquire what were the means for ascertaining whether money, issued in accordance with Parliamentary authority, had been actually spent as intended. Revenue issued to a department for one purpose might be spent on another; or the persons to whom it was issued might squander or misapply it. In the first instance Parliament would be defrauded, in the second both Parliament and the Crown.

The old system of audit.

Some sort of audit existed from very early times [2]. The receivers of revenue accounted to the Treasurer and Barons, and later to the Auditors of Imprest, and the issue of money was audited first by the Barons, then by auditors appointed for different classes of expense. A systematic audit appears to have been provided in the reign of Elizabeth, when

The Auditors of Imprest.

Auditors of Imprest, or money issued for public use, were established. The two Auditors of Imprest, like the great officers of the Exchequer, were paid by fees and did their work by deputy. In 1780 Commissioners of Public Accounts were appointed to inquire into the whole system of 'receiving, collecting, issuing, and accounting for public money [3],' and to make recommendations.

[1] Cobbett, Parl. Debates, vol. xviii, pp. 753–802.

[2] Return, 1869, ii. p. 331, and see Thomas, History of Exchequer.

[3] 20 Geo. III, c. 54.

The system of audit as then practised fell under their scrutiny. It was found to be an expensive farce. In the year 1783 each Auditor enjoyed an income of £16,000 a year[1]. In 1785 they were abolished by statute[2], and a body of five Commissioners appointed for auditing the public accounts. Audit Board.

This can hardly be said to have been an immediate success, for in 1806 the Chancellor of the Exchequer complained that the expenditure of more than £450,000,000 of public money was at that date unaudited[3]. But this Audit Board inherited large arrears from its inefficient predecessors. Its powers were extended by statute and its working proved efficient in a high degree. Its duties were, however, transferred to the Comptroller and Auditor-General by the Exchequer and Audit Act of 1866, to which I shall presently refer.

The institution of the Audit Board was followed in 1787 by the institution of the Consolidated Fund. From the Revolution until 1787 it had been the practice to assign specific taxes to specific charges, with the result that the public accounts became extremely complicated. In the Customs, for instance, there were seventy-four separate accounts, each setting forth the receipt of revenue from a particular source and its expenditure on the service to which it was appropriated. In 1787 was established the Consolidated Fund into which was 'to flow every stream of the public revenue and from whence to issue the supply for every public service[4].' The produce or particular taxes was no longer appropriated to particular heads of expense. 1787. Consolidated Fund.

From the death of Anne until 1802 no regular statement of the finances of the country was compiled or published, and until 1822 no *balanced* annual account of the public income and expenditure was presented to Parliament. 1802. Accounts compiled. 1822. Balanced accounts presented.

Since 1822 such statements have been regularly presented.

In 1826 the Chamberlains and their tallies disappeared. 1826. The tallies disused.

[1] Return, 1869, ii. 331. [2] 25 Geo. III, c. 52.

[3] Cobbett, Parl. Debates, vol. vii, p. 300.

[4] Thirteenth Report of Commissioners of Public Accounts, p. 60, March, 1785. The Consolidated Fund was established by 27 Geo. III, c. 13.

1832. Appropriation account.

In 1832 besides the *cash* account there was introduced an *appropriation* account of the money received for expenditure on the Navy. This form of account, which presents the correspondence of the Parliamentary grant with the ultimate outlay, has since been applied to every head of public expenditure [1].

Abolition of Exchequer offices, 1834.

In 1834 the Exchequer offices were abolished, and with them the costly sinecures, the cumbrous procedure, the unintelligible language, and yet more unintelligible numerals, which had formed part of the 'course of the Exchequer [2].'

Henceforth the revenue of the country was to be paid to the Exchequer account at the Banks of England and Ireland, and the payments which had been heretofore made at the Exchequer itself (as distinct from those made through the Paymasters of the Army, Navy, and Ordnance) were to be made by one person, a Paymaster of the Civil Service.

Comptroller-General.

The Comptroller-General and his staff took the place of the Auditor of Receipt and Clerk of the Pells. He was sheltered from political or party prepossessions by a disability to sit in Parliament; like the judges, he held office during good behaviour, but was removable by the Crown on address of both Houses of Parliament [3]. Without his authority no money could be issued from the Exchequer account by the Banks of England and Ireland. Every credit which he opened there in favour of any department of the public service was recorded in his office, and this record was the foundation of the Public Accounts.

Paymaster-General.

In 1836 was constituted the office of Paymaster-General through whom are now paid all the public moneys due for the Army, Navy, and Civil Services [4].

[1] Applied to Naval expenditure by 2 & 3 Will. IV, c. 40; to Military expenditure by 9 & 10 Vict. c. 92; to all expenditure by 29 & 30 Vict. c. 39.

[2] Instead of seventy-five clerks, besides messengers and watchmen, the new establishment consisted of the Comptroller-General, the Assistant-Comptroller, the chief clerk, the accountant, and five clerks, in the principal office. Recollections of a Civil Servant, Temple Bar Magazine, Feb. 1891.

[3] 4 & 5 Will. IV, c. 15.

[4] See 5 & 6 Will. IV, c. 35; 11 & 12 Vict. c. 55, whereby the various offices of Paymaster were consolidated into one office.

In 1861 the House of Commons adopted the recommendation of the Committee on Public Moneys, that a Committee of Public Accounts should be annually appointed to report on the accounts presented to the House. Of the duties of this Committee I will speak presently. Committee of Public Accounts.

In 1854 the financial year was finally adjusted: it had previously varied from time to time. Until 1793 it began on October 11, Old Michaelmas Day: from 1793 a supplementary account was made up to January 5, and in 1802 the financial position of the country was required to be stated in a return made up to January 5 and presented to Parliament before March 25[1]. In 1832 Lord Althorp, the Chancellor of the Exchequer, asked for supplies for a year ending on March 31, taking five quarters in one financial year; and in 1834[2] the newly constituted Comptroller-General was required to present an account annually of payments into the Exchequer, of credits granted, and of moneys drawn, for a financial year ending on April 5. From this date until 1854 the Treasury kept one financial year ending with January 5, the Comptroller-General another ending with April 5, while the supplies were granted for a year ending on March 31. In 1854[3] the last date was fixed for all financial purposes. The financial year.

In 1866 the Audit Board and the Comptroller-General were abolished by the Statute on which rests our present system of control of issue and audit of accounts.

§ 4. *The Exchequer and Audit Act and Modern Practice.*

I stated at the outset of this chapter that the revenue of the country, as it is collected by the departments responsible for its collection, is paid into the Consolidated Fund in the Bank of England. This Fund is not a hoard, but a balance. The Bank can use it, as any other banker can use the balance of his customer, so long as it is forthcoming when required. The Exchequer account at the Bank.

[1] 42 Geo. III, c. 70. [2] 4 & 5 Will. IV, c. 15.
[3] 17 & 18 Vict. c. 94.

The collecting departments.

The Customs, Inland Revenue, and Post Office are the departments in which revenue is constantly accruing. The Receiver of the Commissioners of Woods and Forests who manage the Crown lands is also in communication with the Bank. The departments in which miscellaneous revenue accrues are not collecting departments, nor are they in direct communication with the Bank. In so far as the moneys which they receive pass into the Exchequer at all they pass through the departmental account with the Paymaster-General.

The mode of collection.

The collectors of these three departments send the daily proceeds of their collection to the accounts of their respective departments at the Bank, reserving, under regulations to be explained hereafter, certain sums for local expenditure. The departments pay over, daily, the amount received to the account of the Exchequer, that is to the Consolidated Fund. Sooner or later every penny of revenue collected—including, as I will presently show, the sums reserved by collectors for local use—finds its way to the Consolidated Fund.

The revenue may increase or diminish from two causes. Parliament may increase or diminish taxation, or commercial and agricultural prosperity may wax and wane. But we are not concerned here with the economical considerations which affect revenue. We must assume that, such as it may be, it is flowing steadily into the Exchequer balance, and that the expenditure of the country is going on at the same time; and we ask how is the revenue made applicable to the expenditure?

Parliamentary authority for Expenditure:

For any use of the public money the authority of Parliament is universally necessary. If that authority is, in certain cases and under settled rules, anticipated, as when the collectors of revenue meet the immediate charges of their departments, their action, in order to be legal, must be ratified by Parliament in the course of the year.

permanent, annual.

But the authority given by Parliament is of two kinds, permanent and annual; and this at once divides the expenditure of the country into two classes, the first consisting of fixed charges on the Consolidated Fund, or *Consolidated Fund Services*, the second consisting of sums granted every

year by Parliament, the grant being initiated by the House of Commons in Committee of Supply, and hence called *Supply Services.*

I have described elsewhere the process by which Parliament votes these annual services [1]. The matter before us is how, when voted, they are spent.

The public service is maintained by payments made under the direction of the Treasury out of the national balance, the Consolidated Fund. But neither the Lords of the Treasury, the political executive, nor their permanent staff can touch this balance without the intervention of an official who is remote alike from royal and political influences.

The Comptroller and Auditor-General.

This is the Comptroller and Auditor-General, the creation of the Exchequer and Audit Act of 1866 [2]. He is appointed by latters patent. Neither he nor the Assistant-Comptroller and Auditor may be a member of either House of Parliament. They hold office during good behaviour, and they are removable by the King upon address by both Houses of Parliament. They may not hold their offices in combination with any others held at the pleasure of the Crown. Their salaries are charged on the Consolidated Fund, so that they do not come under the annual consideration of the House of Commons.

Consolidated Fund Services.

Issue of money for Consolidated Fund services;

Where money is wanted to meet *Consolidated Fund Services* the Treasury makes a requisition to this officer for a credit on the Exchequer account. The Comptroller and Auditor-General, if satisfied that the requisition is in accordance with the Acts which govern the proposed expenditure, makes the order, and thus unlocks the Treasury chest. The Treasury then calls upon the Bank to transfer the sums required from the Exchequer account to that of a principal accountant, usually the Paymaster-

[1] Part i, Parliament, ch. vii. sect. iii. § 2.

[2] 29 & 30 Vict. c. 39, s. 3.

General[1]; and at the same time to transmit the authority for the transfer to the Comptroller and Auditor, who is thus enabled to record the issues from the Exchequer. Of these he subsequently receives and examines an account called the Consolidated Fund Account.

their amount and character.

The charges on the Consolidated Fund amount to more than one-fourth of the national expenditure.[2] They are to be seen in detail in the Finance Accounts of each year. They fall into four groups: (1) the interest and management of the National Debt, (2) the repayment of capital, (3) payments in aid of local taxation. These three in 1907–8 amounted to £40,566,000. (4) Miscellaneous. This, though a small item amounting to no more, in the above period, than £1,972,000, is not uninteresting. It includes among other things the salaries of the Judges, of the Speaker, of the porter of Holyrood House, of the perpetual curate of the Isle of Alderney, and of the Regius Professor of Civil Law in the University of Oxford.

Supply Services.

The remaining three-fourths of the national expenditure is voted every year by Parliament. We must consider how this expenditure is estimated, voted, and paid.

Estimates.

In the last two months of every calendar year the estimates for the Army, Navy, and Civil Service are presented by the departments concerned, separately, to the Treasury. There they must be considered and approved: for the Treasury guards the public purse, and the Chancellor of the Exchequer, who must ask the Commons to vote the money, becomes thereby responsible for the demands of these departments.

Important questions of expenditure on the Army and Navy are settled by him with the heads of those great departments, often in Committee of the Cabinet. Such

[1] Payment of dividends due by way of interest on the National Debt is made by the Banks of England and Ireland, which receive about £180,000 a year for services in this respect.

[2] The total Consolidated Fund services for 1907–8 were £42,627,000; the Supply services, £109,185,000.

questions are matters of general policy, and these estimates when agreed to by the political chiefs are only subject to Treasury supervision in minor details.

Conflict of departments.

But the Chancellor of the Exchequer may find himself in conflict with the heads of the spending departments. The War Office, for instance, may want more than he thinks it necessary or prudent to ask Parliament to grant. In such a case he may adopt one of two courses. He may refer the estimates back to the spending department whence they came, with a request that a substantial reduction may be made, or he may, with the aid of his permanent staff, contest the various items of expenditure and endeavour to convince the War Office that less will suffice. If the parties cannot agree they may appeal to the Prime Minister, and the ultimate issue may be left for decision to the Cabinet. Here the dispute must end in one of three ways—by one or other minister accepting defeat, or by the resignation of the minister against whom the decision of the Cabinet has gone, or by a compromise in which the Chancellor of the Exchequer agrees to ask for a sum rather larger than he considers to be necessary, while the Secretary of State for War agrees to forgo some outlay which he believes to be important for the public service.

But the more valuable part of Treasury control consists in the need of Treasury sanction to the creation of any new post or the increase of any salary in the Civil Service; or to any change in the precise methods of expenditure indicated in the estimates. Payments made for such objects without such sanction would be disallowed at the audit of accounts; and this sort of supervision, backed, as we shall see, by the provisions for audit, stops the constant leakage of public money in *items* of outlay, trivial perhaps in themselves, but amounting in the mass to a heavy demand upon the taxpayer.

Votes.

But let us suppose the parties to be agreed. The estimates are submitted to the House of Commons in certain large subdivisions or chapters, technically called '*votes*.' The Army and Navy estimates are each broken up into

from ten to twenty of these votes, the Civil Service estimates into about eighty.

Supply.

If the House of Commons approves of these estimates it agrees to them by votes in Committee of Supply, which votes are reported to the House. To provide for these votes the House goes into Committee of Ways and Means, and there makes the necessary grants from the Consolidated Fund. These resolutions in Committee of Ways and Means, reported to and adopted by the House, are (as I have explained elsewhere) embodied in Bills, once or twice throughout the Session. Such a Bill, when it has passed the Lords and received the assent of the Crown, becomes a Ways and Means Act, or Consolidated Fund Act, and gives Parliamentary authority for the payment of public money while the Session is going on, and before the Appropriation Act is passed. This Act embodies any previous Acts, sets out in detail the votes sanctioned by the Commons in Committee of Supply, and appropriates to them specifically the sums needed from the Consolidated Fund.

Ways and Means.

The Appropriation Act.

The Consolidated Fund Act.

Pending the Appropriation Act, a Consolidated Fund Act (or if necessary more than one) is passed to provide for the immediate needs of the Army, Navy, and Civil Service, so far as Parliament is concerned.

A brief explanation may be needed as to the Consolidated Fund Act, which is passed every year before April 1. The financial year ends on March 31, and the funds provided by the Appropriation Act of the previous year are no longer available unless already issued. Some provision is necessary to carry on the business of the country during the remainder of the Session while the House of Commons is discussing votes in supply, and until the passing of the Appropriation Act for the year. For this purpose the Government obtains one or two votes for the Army and the Navy respectively and a vote on account for the various branches of the Civil Service. The reason for this difference is that in the case of the Army and Navy but one account is kept for each service[1], and money granted

Why needed.

[1] The expenditure for Army and Navy is often incurred at a distance,

Vote on account.

under any one vote may be temporarily applied to purposes specified in other votes, provided always that by the end of the year the issues of money correspond with the votes embodied in the Appropriation Act. The Civil Service and Revenue votes have each a different account at the Pay Office, and so a sum has to be obtained on each vote for the expenditure on these departments. This is done by means of the vote on account taken before March 31 in every year, by which money is granted and its issue authorized for each branch of these services. They are thus enabled to carry on their business until their full votes have been discussed, granted, and embodied in the Appropriation Act. We now can pass from the Parliamentary authority to the acts done under that authority.

Issue of money.

The money has been granted to the Crown by Parliament for certain purposes: and the first step in the process of expenditure is a Royal Order, reciting the grant and desiring the Treasury to authorize the Bank of England to make payments from time to time in accordance with the terms of the grant. The order is under the sign manual and is countersigned by two Lords Commissioners of the Treasury.

Royal Order.

Requisition for credit.

The Lords Commissioners thereupon demand of the Comptroller and Auditor-General that he will give them credit for the sums required upon the Exchequer account at the Bank. This is done. The Treasury then, from time to time, directs the Bank to transfer the sums specified in the Royal Order to the 'supply account' of the Paymaster-General, and to communicate such transfers to the Comptroller and Auditor-General[1].

Transfer to Paymaster-General.

The departments are then informed that the sums voted by Parliament, or part of them, are placed to their account with the Paymaster-General. Thenceforth they are responsible for the disposition of the money in accordance with the votes, and this responsibility is enforced by the Comptroller and Auditor-General.

and through sub-accountants, or, in case of service abroad, through the Treasury Chest (vide *infra*). The issues cannot therefore conveniently be made for the service specified in each separate vote.

[1] For the forms relating to this expenditure see Appendix.

Account and Audit.

So far we have traced the revenue from the pocket of the taxpayer into the hands of those to whom payment is due for the rendering of some public service.

We have seen that the produce of the taxes imposed by Parliament must lie at the Exchequer account in the Banks of England and Ireland until Parliament has given authority for its expenditure, and that so much of this produce as is granted from time to time by Parliament to the Crown cannot be withdrawn by the servants of the Crown from the Exchequer balance without the sanction of an independent, non-political officer who holds, as it were, the keys of the Exchequer.

The Comptroller and Auditor-General.

We have still to see how security is taken that the money issued for certain purposes is actually expended on those purposes: that not merely the issue, but also the expenditure of the money paid corresponds with the votes.

Accounts furnished to him,

The security required is obtained by the twofold powers of the Comptroller and Auditor-General. He not only controls the issues, but receives and audits the accounts of expenditure. Every day two accounts are furnished to him, one from the Banks of England and Ireland, of receipts and issues of the Consolidated Fund, and one from the Revenue departments, of the sums paid to the Fund. These (which are also supplied to the Treasury) enable him to check the Bank account as to receipt of revenue. He also follows, very closely, the course of expenditure, having in the larger spending departments a local staff whose audit may be said to be concurrent with the outlay. In smaller departments his audit is periodical and monthly.

audit conducted by him.

In respect of the Consolidated Fund Services and the Supply Services, Parliament receives every year Finance Accounts and Appropriation Accounts.

Finance accounts.

The Finance Accounts are laid before Parliament on or before June 30 in each year. They are prepared by the Treasury, and they contain a detailed statement of the receipts and of the issues for Consolidated Fund Services as well as Supply Services. But so far as expenditure is

concerned, these accounts only state the purposes for which the money was issued.

The *Appropriation* accounts on the other hand are rendered to the Comptroller and Auditor-General by the departments which have been entrusted with the expenditure of public money. They are examined by him in order that he may ascertain whether the money has been spent in accordance with the votes of Parliament: whether any Acts of Parliament, Orders in Council, Royal Warrants or other authority governing any particular expenditure have been duly complied with: whether increased salaries or new offices have arisen without the previous sanction of the Treasury. Thus the Comptroller and Auditor-General acts on behalf of the House of Commons and of the Treasury, ensuring not merely that expenditure is in correspondence with the votes, but that it is made subject to the control with which Parliament has invested the Treasury. The Appropriation account relates to *Supply Services* only, but the Consolidated Fund Services are also examined and reported upon. Appropriation accounts.

Our expenditure is spread over a wide surface, and the accounts of the financial year ending on March 31 do not all reach the Comptroller and Auditor-General until November 30 following: but in February of the next year his report is laid before the House in three volumes dealing respectively with the Army, Navy, and Civil Service.

The House refers the reports to the Public Accounts Committee—a standing Committee—which examines them and calls attention to any want of correspondence between votes and payments or other irregularity which may appear on the reports of the Comptroller and Auditor-General. Public Accounts Committee.

The Reports of the Public Accounts Committee are dealt with in the first instance by Treasury Minutes, directing the spending departments to observe the recommendations made by the Committee. A serious discrepancy between the votes and the expenditure would no doubt be taken up by the Opposition and dealt with by the House.

So we may summarize this procedure. The Commons vote and Parliament enacts that certain sums shall be granted to Summary.

the King for certain purposes. It is the business of the Treasury to see that the money so granted is issued for the purposes for which it was granted. After this the departments which receive the money are responsible for its proper application. The duties of the Comptroller and Auditor-General are, as regards issue, ministerial; as regards expenditure, judicial. When he is satisfied of the intentions of Parliament that money should be spent on a given object he ministers to the needs of the Treasury; when the money has been spent he judges whether or no it has been spent in accordance with the votes of Parliament.

When he has reported to the House of Commons the circle is complete, and the House which granted and appropriated the money learns how far its intentions have been carried into effect.

There are still a few points to note.

Supplementary estimate.

Estimates prepared in November of one year may be found in the next to be insufficient, and this may be discovered before the end of the Session, or before the end of the financial year. When this happens supplementary estimates are presented either at the end of one session or the beginning of the next, so that supply may be granted, a Ways and Means Act passed, and the transaction concluded within the financial year which ends on March 31 [1].

Excess vote.

Or at the close of the account it may be found that a vote has been exceeded, that is to say, that a department has spent more on a given object than Parliament had granted that object. This would be matter for inquiry by the Public Accounts Committee. An excess vote is by their recommendation submitted to the House and passed, in order to make good the deficiency.

It was stated in general terms that all payments were made through the Paymaster-General. But this must be qualified in certain ways.

Treasury Chest Fund.

First, the Treasury makes advances to sub-accountants of the Army, Navy, and Civil Service at distant stations. This is done out of the Treasury Chest Fund, a banking

[1] As to the financial year, vide *supra*, p. 149.

fund with a capital of not less than £700,000, or more than £1,000,000, the dealings with which are regulated by Statute[1]. These advances are reclaimed throughout the year by the Treasury from the different departments to which money has been voted to meet these payments, and an account is rendered by the Treasury, at the end of the financial year, to the Comptroller and Auditor-General.

Civil Service Contingencies.

Next, the Treasury deals in like manner with another fund at its disposal, called the Civil Contingencies Fund, which has a fixed capital of £120,000. Advances made in anticipation of Parliamentary votes, and to meet unforeseen contingencies, are all repaid to this fund by the orders of the departments concerned, on demand from the Treasury, when Parliament has voted the money. Repayments to this fund are not made until the year after the money has been advanced.

Advances by collectors: how made,

Thirdly, the collectors of revenue are authorized, under certain regulations, to make payments in their districts out of the funds which they collect. These payments may be needed for the expenses of the collecting department, or they may be advances to other services within the district, and may thus save the transmission of money to and fro. Such advances are repaid to the revenue department, and when repaid are at once paid into the Consolidated Fund.

Thus a collector of customs on a given day receives £700 of revenue, of which £150 is required for the expenses of his department, and £100 for the army. These charges he meets, and if the Bank of England has no local branch on the spot he pays in the remaining £450 to a local bank, obtaining a bill payable in three or four days in London. This he transmits to the Customs Office in London, together with vouchers for the £250 expended. The £450 is paid by the Customs at once into the Consolidated Fund. The two other sums will in due course be recovered out of money granted by Parliament in the one case for the Army, in the other for the collection of revenue, and issued to these departments, under the formalities described

and repaid.

[1] 40 & 41 Vict. c. 45; 56 & 57 Vict. c. 18.

earlier. When recovered they are paid into the Consolidated Fund.

Thus all revenue, sooner or later, goes into the Consolidated Fund, and all payments are ultimately provided for by Exchequer issues.

The national accounts are cash accounts.

Another feature to note in the mode of keeping and presenting the national accounts is that they are strictly *cash* accounts. Taxes due for the year 1907–8, but not paid till April 2, 1908, are treated as the receipts of the year 1908–9. Liabilities incurred in one year but not paid till the next are charged against the revenue of the year in which they are paid.

Conveniences of this method.

Although for purposes of account and audit nothing is treated as a final payment until accounted for as actually expended, yet issues made from the Consolidated Fund to the accounts of the various departments with the Paymaster-General are treated as expenditure for the purpose of an *interim* account. This practice, together with the daily record of receipts and issues, makes it possible to produce a statement of the national income and expenditure up to date, on any day, with a few hours' notice.

§ 5. *Change in character of Treasury control.*

Duties of Treasury and Exchequer:

Before the Revolution the Treasurer was concerned with expedients for raising revenue, and with the direction of expenditure. The Exchequer officers received the revenue, and took charge of it, and saw that it was not issued except by proper authority. But they all alike had to consider only the King's interest, and, except in the case of the appropriated subsidies of Charles II, to carry out the King's directions.

to the King before 1688,

to Parliament since.

From the Revolution onwards the Treasury and Exchequer have been called upon to carry out the directions of Parliament in respect of supplies specifically voted for and appropriated to certain purposes.

Throughout the early part of the eighteenth century the duties of the Treasury Board were carefully discharged. The representatives of the Army, Navy, and Ordnance came to

the Board for the moneys voted by Parliament, and these sums were paid out in strict conformity with the votes of Parliament and the needs of the services. Relaxed control after 1760.

From the time that the King received a fixed income independent of the hereditary revenues, his interest in the business of the Treasury declined, and he ceased to preside at the Treasury Board. The rapid changes of ministry which took place between 1760 and 1770, and the immense cost of our participation in the Seven Years' War, and of our struggle with the American colonies, seem to have relaxed Treasury control, and in other respects to have brought out the weak points of our financial system. The issue and expenditure of the revenue had ceased to be important to the King, and the Treasury had not realized its responsibilities to Parliament and the nation. So from 1760, or earlier, to 1780 our public service seems to have been a paradise for sinecurists and unscrupulous consumers of the public money.

The Civil Service was paid partly by charges on the Civil List, partly by fees received from those who had to do business with the public departments, or, where the business was concerned with the public money, by percentages on the sums dealt with. The Commissioners of Public Accounts appointed in 1780 found the Tellers of the Exchequer and Auditors of Imprest enjoying incomes of from £10,000 to £15,000 a year, and doing nothing except by deputy. Payment of Civil Service by fees, and percentages,

As regards the payment of the Army, Navy, and Ordnance it had become the custom to issue on demand to the Paymaster of the Forces, and the Treasurers of the Navy and Ordnance, the sums voted by Parliament for those services. The money remained in the hands of these officers till it was wanted, and the delay in rendering any account of its expenditure took away all semblance of Treasury control. of other services, through officers.

While Henry Fox, Lord Holland, was Paymaster of the Forces, from 1757–1763, there passed through his hands more than forty-five millions of the public money. For fifteen years after he had left office he or his representatives retained a balance, unaudited and unaccounted for, of Abuses.

£475,000. This sum was retained in view of possible claims which might be made upon Lord Holland by sub-accountants to whom the money might be due. It was in fact money voted by Parliament, and either not spent or not claimed by those who were entitled to it. Under such a system the Auditors of Imprest, even if they had been zealous in their vocation, might have found obstacles in their path. In this, as in other matters, the turning-point in the financial history of the last two hundred years is to be found in the appointment of the Commissioners of Public Accounts, who reported at intervals from 1780 to 1786, and in the contemporary legislation initiated by Mr. Burke.

Commissioners of Public Accounts.

By Acts passed in 1782–1783 the abuses of the Pay Office were corrected, and a minister was no longer allowed to make a profit out of money granted for the public use.

Changes in modes of payment.

At the same time began the gradual abolition of the practice of paying public servants by fees extracted from the pockets of those who had to do business with the departments of government, or by percentages on money on its way from the Exchequer to the payee.

Fee fund.

The process of change in this respect seems to have been, first, the creation of a fee fund, consisting of the fees formerly paid to individuals and forming the fund out of which the salaries of the department should be paid, and then the payment of this fee fund into the general account of the Exchequer when the salaries became a fixed charge on the Consolidated Fund, or a charge annually appearing on the votes—*Consolidated Fund Services* or *Supply Services*.

Fixed salaries.

A better system of issue and audit made it more and more difficult for a public servant to make use of public money as it passed through his hands. The only persons who now get any benefit from the public money on its way from the pocket of the taxpayer to the pocket of the individual to whom Parliament has appropriated it, are the shareholders of the Bank of England, who enjoy the use of the Government balance in return for the service rendered as bankers by the Governor and Company of the Bank.

The Civil List.

Fees and percentages formed one mode of remunerating public servants; but their more regular emoluments were a charge upon the Civil List.

Meaning of 'Civil List.'

The Civil List is a term used sometimes to mean the annual income granted to the Sovereign to meet certain charges, sometimes to mean the charges thrown upon this income.

Included all civil expenditure.

It originally meant the whole charge for civil expenditure, and to meet this charge the Commons in 1689 appropriated £600,000 out of the entire revenue of the country, including the hereditary revenues of the Crown, which at that time were estimated to produce about £300,000 a year. The charges on this fund consisted of the cost of the royal household, palaces, and gardens, the salaries of foreign ministers, of the judges, and of the civil service at home, together with pensions granted in this or the preceding reigns[1].

Amount of civil list.

The sums which came to the Crown for these purposes may be worth stating here[2].

	1701. William III. £	1713. Anne. £	1726. George I. £
Hereditary and Temporary Excise	413,075	439,008	513,703
Post Office	75,258	92,008	95,273
Hereditary Revenue, small branches	55,141	45,271	71,131
Additional Subsidy of tunnage and poundage	297,070	253,679	279,142
Tax on Salaries (6*d.* in the £)	.....	.....	2,095
Grant from Aggregate Fund	.....	.....	120,000
	840,544	829,966	1,081,344

Deductions.

From these totals considerable deductions must be made. The financiers of the eighteenth century were wont to appropriate certain taxes to certain services, and then take part of them for other services. Thus they took £3,700 a week from the Excise produce, and another £700 from that of the Post Office, and applied it to general revenue. So

[1] A list of these charges is to be found in Parl. Hist., vol. v, App. xix, and in the Return of 1869, ii. p. 586.

[2] Return, 1869, ii. pp. 594, 595, 597.

the civil list income of Anne was not more than £590,000 in 1713, nor that of George I more than £813,844 in 1726.

George II. When George II came to the throne Parliament guaranteed him an income of £800,000 a year if the hereditary revenues together with those provided by Parliament fell short of that sum; but the King was to take the benefit of any surplus which might accrue.

Thus when George III came to the throne provision for the Civil List had been made from three sources: the hereditary revenues, the additional taxes appropriated to the Civil List by Parliament, and a further sum which Parliament might be called upon to furnish if the two previous items did not amount to £800,000.

George III for his life. George III surrendered his rights to the hereditary revenues arising from the Crown lands, the Excise, and the Post Office. Parliament in return granted him an income of £800,000 a year. The King retained some small branches of hereditary revenue in England, and the hereditary revenues in Scotland and Ireland, and from time to time the amount of the income was increased by Parliament. But in spite of this, and in spite of a household economy which was almost penurious, the Civil List was frequently in debt.

Its insolvency gave Parliament an opportunity of regulating its expenditure. This was first attempted in 1782. The Civil List was divided into classes to be paid in a prescribed order:—

Regulation of Civil List, 1782.

1. Pensions and allowances to the Royal family.
2. Salaries of Lord Chancellor, Judges, and Speaker.
3. Salaries of ministers resident at foreign Courts.
4. Tradesmen's bills of the Household.
5. Salaries of menial servants of the Household.
6. Pensions.
7. Other salaries payable out of revenues of the Civil List.
8. Salaries and pensions of the Commissioners of the Treasury and Chancellor of the Exchequer.

The Treasury was given a practical interest in the receipts and payments of the Civil List. Its officers came

last, so that unless there was vigilance over income and economy in expenditure they would not get paid at all.

Transfer of charges from it.

In 1816 various payments to members of the royal family were transferred from the Civil List to the Consolidated Fund. George IV surrendered to Parliament the hereditary revenues of England and Ireland. William IV surrendered in addition the hereditary revenues of Scotland, besides certain Admiralty and Colonial sources of income. In return the Civil List of William IV was relieved of all public charges except £23,000 for secret service money. This practice has been carried further in the ensuing reigns. The pay of public servants is now wholly removed from the Civil List, and appears on the votes or is charged on the Consolidated Fund, and their number and salaries are brought by various statutes under State control.

The present Civil List.

The payments on the Civil List are now as follows:—

	£
For Their Majesties' Privy Purse	110,000
Salaries of the Household and retired allowances	125,800
Expenses of the Household	193,000
Royal Bounty and Alms	13,200
Works	20,000
Unappropriated	8,000
	470,000

Further provision is made out of the Consolidated Fund for the Prince and Princess of Wales, the King's daughters, and for the Queen should she survive the King. Civil list pensions, which may be granted in each year to the amount of £1,200, and which are a reward for public service, attainments in literature, or discoveries in science, are no longer charged on the Civil List, but paid out of the Consolidated Fund[1].

The Civil List accounts are not audited by the Comptroller and Auditor-General except the *item* of pensions. There is an Auditor of the Civil List, usually one of the principal clerks of the Treasury. With this trifling exception the whole expenditure of the country is supervised

[1] 1 Ed. VII, c. 4, and see 1 & 2 Vict. c. 2.

and controlled by the Treasury in the interests of Parliament and the taxpayer rather than of the Crown. For Parliament not only determines how much shall be spent on the public service, but in what manner it shall be spent. And it is the business of the Treasury to take heed, firstly, by supervision of the estimates that the demands made upon Parliament by the King's ministers are not excessive, and, secondly, that the directions of Parliament as to issue and expenditure of public money are exactly fulfilled by the departments concerned. And in this last respect if we ask: 'Quis custodiet ipsos custodes?' the answer is prompt and effective, 'The Comptroller and Auditor-General.'

CHAPTER VIII

THE ARMED FORCES OF THE CROWN

This chapter has to do with the land and sea forces of the Crown; it would seem to fall into two sections, the first dealing with the mode in which these forces are composed and disciplined, and with the consequent *status* of soldier and sailor, the second dealing with the constitution of those departments of the central executive by which Army and Navy are governed. In both sections a brief historical outline will be necessary. The sections may be called respectively, (1) the Army and Navy, (2) the War Office and Admiralty.

Two features are common to both services and are characteristic of our constitution. The Land and Sea Forces of the Crown are recruited by voluntary enlistment; conscription has no place in our military or naval system: and the ministers responsible to the King and to Parliament for the well-being and the efficiency of the Army and Navy are civilians, to whom the best professional advice is accessible, but who are rarely, if ever, possessed of professional experience in either branch of the service.

Section I

The Army and Navy

§ 1. *History of the Military Forces.*

Our military forces have varied in character, and their history falls into two distinct periods, divided by the Commonwealth. During the first of these there were two recognized forces, the feudal levy and the national levy: in addition to these the Crown was ever striving to possess itself of a third force, which should not be limited in its liability to service either by time, like the feudal levy, or as to place, like the national levy. The experience of the

Commonwealth taught the nation what such a force might be, how efficient a standing army could be made, and how dangerous it might become to the liberties of the people.

The Feudal Levy.

Feudal liabilities.

The feudal levy, though not the oldest, may be dealt with first and briefly. It was the force which the King could raise by calling on tenants in chivalry to discharge the obligations of their tenure. It was a cavalry force, limited in its liability to service to forty days in the year [1]. When summoned, it was summoned like the *Commune Concilium* of the Charter: the great barons received a special writ, the lesser tenants-in-chief were summoned through the sheriff [2]. In 1159 this service was commuted for a payment of two marks on the knight's fee. Henceforth the money commutation became usual, until by the end of the fourteenth century it had fallen into disuse [3]. In 1661 military tenures were abolished [4]; they had long possessed, in their burdensome incidents, a merely historical connexion with military service, and with their abolition the feudal levy became impossible.

The National Levy.

The *fyrd*:

The Saxon *fyrd* was a part of the *trinoda necessitas* which rested on all lands: it was the liability of every landowner to be prepared for summons to watch and ward. This defensive force was organized by Henry II in the Assize of Arms, and the Assize of Arms was in turn adapted to the circumstances of the time by the Statute of Winchester (13 Ed. I). It existed for the maintenance of civil order and for purposes of military defence. It might be called out to suppress riot and pursue criminals, or to defend the country in case of invasion. The sheriff was responsible

its liabilities and uses.

[1] This is the term of service usually stated (Blackstone, Comm. ii. 75); but Dr. Stubbs says that 'from the statement contained in the writ of summons we get a somewhat indistinct idea of the limits of the feudal obligation'; Const. Hist. ii. 279.

[2] Ibid. 278.

[3] Ibid. 521.

[4] 12 Car. II, c. 24.

for its efficiency and summons; it was essentially a county force, not bound to service beyond the county except in case of invasion [1].

Liabilities annulled as to arms,

The lieutenant of the county was substituted for the sheriff in the discharge of this duty, by 3 & 4 Ed. VI, c. 5, which required all officers and inhabitants of the county to attend this new officer, when required, for the suppression of riot or rebellion. In the fourth year of Mary's reign the laws relating to the liability to keep arms and serve were consolidated [2], but in the reign of James I these Statutes of Armour were wholly repealed [3].

not as to service.

Nevertheless, though the requirements as to maintenance of arms and equipment were cancelled, the general liability to military service remained, and the appointment of the lieutenants of counties, in whose control it lay, was the final cause of rupture between Charles I and the Long Parliament.

Armies before the Commonwealth.

Need of an army.

But the levy for defensive purposes did not satisfy the requirements of Kings who wanted a force available, at once, anywhere, and for any time: and various modes were adopted to raise such a force. The liability to military service was used as a means of collecting men, sometimes under pressure by Commissioners of Array, and the levy, when collected, was used not merely to resist invasion from Scotland, but for foreign war. This was frequently done by Edward I, who paid the levies for their service, and by Edward II, who threw the charge on the townships and counties whence the men came [4]. Such a practice was declared illegal by a series of Statutes from 1349 to 1402, and the law was then clear:—that no man could be constrained to find men-at-arms or archers unless he held his lands on the terms of such service, or else by force of grant

Modes of raising it,

declared unlawful.

[1] This point, which had been disputed in the fourteenth century, was settled by Statute in 1402; 4 Hen. VI, c. 13.

[2] 4 & 5 Ph. & M. c. 2.

[3] 1 Jac. I, c. 25, s. 7; 21 Jac. I, c. 28, s. 11, sub-s. 44.

[4] Stubbs, Const. Hist. ii. 284, 285.

and assent in Parliament; that no man could be required to serve out of his own county except in case of invasion; that volunteers who served the King abroad should do so at the King's cost.

Hiring.

The armies of Henry V were mainly composed of troops hired by the King himself, or raised by lords under indentures made with the King[1]. The Yorkist and Tudor Kings made pretext of invasion from Scotland to send Commissions of Array into the counties and call on men to serve, without consent of Parliament or payment by the Crown. The step onwards to impressment was easy. The Tudors and Stuarts clearly regarded it as a prerogative of the Crown[2]. The Statute 16 Car. I, c. 28, declared impressment, or compulsion to serve outside the county, to be illegal, 'save in case of necessity of invasion or by reason of tenure.'

Impressment.

Billeting.

But, even if the King could manage to collect troops and could afford to pay them, they needed to be fed, lodged, and kept under discipline. The Petition of Right made it illegal to quarter troops upon householders, and to issue commissions 'giving power and authority to proceed within the land according to the justice of martial law[3].'

Discipline.

Difficulty of raising and keeping an army.

After the Restoration, and the abolition of military tenures, the national levy remained the only lawful armed force in the country. The King might raise troops by contract or voluntary enlistment, if he could afford to pay them, or if Parliament would grant him the necessary funds, but the maintenance of discipline was rendered practically impossible, because, unless troops were on actual service in war, the law permitted no departure from the settled rules which protected the liberty of the subject.

[1] Stubbs, Const. Hist. iii. 540.

[2] 35 Eliz. c. 4 provides for the relief of soldiers disabled after being 'pressed and in paye for her Majesties service.' See, too, a reference to Shakespeare, Henry IV, Part i, Act iv, sc. 2, in the Manual of Military Law published for the use of the War Office, a work of which I have made much use in this chapter.

[3] 3 Car. I, c. i. ss. 6, 7. The matters complained of seem to be an extension of the right of *purveyance*, which, after restraint by many Acts, was abolished by 12 Car. II, c. 24, s. 12. See Stubbs, Const. Hist. ii. 285, 535.

The Standing Army.

Character of objections.

And the objections to the maintenance of a standing army had widened in character. Before the Commonwealth the requirements of military service had been regarded as oppressive to those who were required to serve; it was hard for the citizen to be made a soldier against his will. Cromwell had taught the people that a standing army might be dangerous to national freedom. Henceforth the objections to a standing army are not so much that it involves hardship to the men who compose it, as that it is an instrument of despotism. The soldier is no longer an injured citizen, he is a danger to the state.

Armies after the Restoration.

When the army of the Commonwealth was disbanded the King was permitted to retain guards for his personal attendance, and garrisons for the fortified places in the country [1]. Charles II and James II availed themselves of this permission to maintain considerable bodies of troops, and the government of their guards and garrisons was regulated by Articles wherein offences deserving death were reserved for trial by the ordinary courts [2]. But their armies were the subject of remonstrance and suspicion; and when the Crown was offered to William and Mary, the Declaration of Rights laid down and the Bill of Rights enacted that—

> The maintenance of a standing army in time of peace without consent of Parliament is contrary to law.

The three obstacles.

There are then three obstacles to the maintenance of a standing army by the Crown without consent of Parliament. It is unlawful in time of peace; the necessary rules of discipline involve a departure from the ordinary law; and under the existing method of granting supplies, the

[1] As to the Ordnance, see post, pp. 191, 192, and Clode, Military Forces of the Crown, chapters i, xx.

[2] Manual of Military Law, p. 13. See, too, a letter from the Secretary at War to Col. Kirke, July 21, 1685, containing a direction that in all cases whatsoever where the punishment is to be loss of life or limb, the trial of any offender in His Majesty's pay 'be left to the Common State Law,' the Articles of War being only to take place during the Rebellion that has now ceased. Clode, i. 478.

money needful to pay the troops would not be forthcoming.

The Mutiny Act.

But a standing army is required for our national security. It has therefore been legalized within the United Kingdom every year, for a year, with few breaks [1], since 1689. This is done by the annual Mutiny Act, called since 1881 the Army Act, which also makes provision for the maintenance of discipline, continuously in the Regular forces, and in the Auxiliary forces at certain times and under certain conditions of service.

§ 2. *The Composition of the Military Forces.*

The regular forces.

The military forces of the Crown consist of the *Regular* forces and the *Territorial and Reserve* forces: of the latter I will speak presently. The regular forces again are divided into Indian, Colonial, and British.

Indian,

The Indian forces consist mainly of natives of India, but partly also of British officers and men serving in India. The latter are governed by the Army Act, 1881, the former by Articles of War made by the Indian Government [2].

Colonial,

The Colonial forces may be (1) 'forces raised by order of His Majesty beyond the limits of the United Kingdom and India [3]'—these are substantially part of the regular forces and are governed by the Army Act—and (2) forces raised by the Government of a colony; these are subject to Colonial law: they only fall under the Army Act when serving with the regular forces, and then only so far as Colonial law may have failed to provide for their government and discipline [4].

[1] The gaps in the series of Mutiny Acts are, 1689, 8 days; 1690, 2 months 20 days; 1698, 2 years 10 months; 1711, 4 months; 1713, 2 months 10 days. Clode, i. 390.

[2] Indian military law does not apply to British-born subjects nor to their lineal Christian descendants in the male or female line. See Indian Articles of War, 1869; Acts of Governor-General in Council, No. 5.

[3] 44 & 45 Vict. c. 58, s. 176 (Army Act, 1881). Such forces are the West India Regiment and the Royal Malta Artillery.

[4] Ibid. s. 177.

(a) *The Regular Forces.*

British.

But the British forces are, for our present purposes, the most important. They consist of the Army and the Royal Marines. The Army consists of cavalry, artillery, engineers, and infantry, besides what are called 'departmental corps,' such as the Army Service Corps and the Army Medical Corps. The Royal Marines are a force of infantry and artillery, first raised in 1755. Their mode of enlistment and terms of service correspond with those of the soldier, and when they are not serving on board ship their discipline is provided for by the Army Act. But the force is under the control of the Admiralty ; its numbers are not fixed in the Army Act like those of the regular army, but appear on the votes which the House of Commons is asked to grant in Committee of Supply.

Its numbers; how limited.

This brings us to the first point to note in respect of the regular army. Its numbers are fixed in the Army Act for each year, which, after reciting the necessity for maintaining a body of forces, states the precise number of men of which the force should consist, '*exclusive of the numbers actually serving within His Majesty's Indian possessions.*'

The Indian troops at Malta.

That this limitation of numbers may become of practical importance is shown by the vehement discussion which arose when, in 1878, Indian troops were ordered to Malta, and the right of the Crown to employ these troops outside India in time of peace was disputed.

It was argued that a force of a certain number of men was adjudged necessary by Parliament 'for the safety of the United Kingdom and the defence of Her Majesty's possessions,' that the Indian troops were recognized as an additional force, 'actually serving within Her Majesty's Indian possessions,' and that if the Queen might employ these troops elsewhere in her dominions, consistently with the terms of the Mutiny Act, there was no reason why she should not raise within her Indian possessions an army unlimited by statute as to number, an army which 'she might move and dispose of without reference to Parliament [1].'

[1] Hansard, ccxl. 194.

The practical restriction on such an employment of the Indian army seems to be a clause in the Act for the government of India which forbids the expenditure of the revenues of India on military operations beyond the frontier of India, except in case of urgent necessity, without the consent of Parliament[1]. Thus, a ministry which employs Indian troops outside India must in the end ask Parliament either to find the money or to allow the Indian Government to do so, and must then justify its action.

It is clear that to introduce such troops into the United Kingdom in time of peace without consent of Parliament would be unlawful, because the Army Act suspends the operation of the Bill of Rights only to the extent of the number of troops expressly provided by the Act. But the right of the Crown to dispose of this force freely elsewhere than in the United Kingdom must be regarded as an open question, since the highest legal authorities differed irreconcileably on this point in 1878[2].

Modes of raising troops.

We have now to consider how the number of troops sanctioned by Parliament is raised by the Crown.

Before 1783 this was effected by an arrangement between the colonels of regiments and the Crown. The colonel was empowered to raise recruits, and was bound to keep up the numbers of the regiment. He received a portion of the sum granted by Parliament, and made his own terms with the men[3]. This practice was abolished in 1783[4], when the Government took into its own hands the business of recruiting and the payment of the troops[5].

[1] 21 & 22 Vict. c. 106, s. 55.

[2] See the speeches of Lords Selborne and Cairns, of Sir John Holker and Mr. Herschell; Hansard, ccxl. 187, 213, 369, 515.

[3] Clode, Military Forces of the Crown, i. 74; ii. 2-6.

[4] 23 Geo. III, c. 50.

[5] In time of war, even as late as 1854, noblemen and gentlemen agreed with the Crown to raise corps, on the terms that they obtained the nomination of some of the officers. Clode, ii. 5, 6. The practice would seem to have come from the time when lords and great men raised troops under indentures made with the King, as in the wars of Edward III and Henry V. Something of the sort prevailed under the Tudors. We find in the Acts of the Privy Council [iv. p. 132, Sept. 30, 1552] an entry of payments for bands of horsemen maintained by great nobles.

The term of service for the rank and file has varied. Until a standing army was recognized by Parliament the engagement was for the war on hand. After that it was for life, unless the Crown discharged the soldier. Since 1847 service has been limited. Infantry were then engaged for ten years, cavalry for twelve, but the soldier might re-engage himself up to a term of twenty-one or twenty-four years.

Enlistment: its terms;

The period of service for which the soldier now enlists is twelve years, or such less period as the King may from time to time determine. The provisions for extension of this term or change of conditions of service, of forfeiture of service for misconduct, and liability to transfer from one corps to another have been varied from time to time, but are now settled in the Army Act, 1881 [1]. Enlistment is an engagement between the soldier and the Crown, and the soldier is entitled to the observance of the terms under which he enlisted, though these may have since been changed by Statute.

its forms.

This engagement is made not by acceptance of 'the King's shilling,' but by attestation before a justice of the peace. The recruiting officer gives to the man who offers to enlist a form stating the terms of enlistment and the time and place at which he should appear before a magistrate. If, when he appears, he answers certain questions set forth in an attestation paper (the magistrate taking care that he understands their purport), signs a declaration as to the truth of his answers, and takes the oath of allegiance, he is then a soldier. The attestation has been required since 1694 [2], to ensure that the recruit understands the nature of his engagement; but he may still claim his discharge, if he change his mind within three months, on payment of a sum not exceeding £10. After that date he is bound to serve his time; but the Crown may discharge him at any time in virtue of its prerogative, or a competent military authority may do so under statutory power [3].

Soldier engages for a term:

[1] 44 & 45 Vict. c. 58, s. 76 et seq. [2] 5 & 6 Will. & Mary, c. 15, s. 2.

[3] For the forms of enlistment, see 44 & 45 Vict. c. 58, s. 80; for power to discharge, s. 92.

officer during King's pleasure.

An officer in the army or navy is appointed by the receipt of the King's commission; he thereupon places himself at the disposal of the Crown; he cannot resign his commission without leave, and he is liable to be discharged at pleasure.

The question of the right to resign at will has arisen in the case of a military officer in the service of the East India Company (1769) and of an officer in the Navy (1887). In the former Lord Mansfield said, 'upon the general abstract question we are all of opinion that a military officer in the service of the East India Company has not a right to resign his commission at all times and under any circumstances whatsoever whenever he pleases [1].'

Case of Lieut. Hall.

A more recent case is *ex parte Cuming* [2]. Lieutenant Hall, a lieutenant in the Navy, serving on one of the Queen's ships in commission, having asked leave of the Admiralty to resign his commission and having been refused, left his ship, sent his commission to his captain with an announcement of his intention to retire, and took a passage home in a mail steamer. On his arrival in England he was arrested by Captain Cuming, and detained as a prisoner with a view to his being tried before a court-martial, under the Naval Discipline Act [3]. Captain Cuming was called on to show cause why a writ of *habeas corpus* should not issue and Hall be discharged. The Court held that Lieutenant Hall could not resign his commission in the mode which he attempted, and that he was rightly in custody.

'It is not necessary for us to decide the very grave question whether the mere acceptance of a commission would of itself and under all circumstances suffice to bring an officer within the jurisdiction of a court-martial for refusing to enter upon any particular service. Some of us as at present advised are of opinion that it would not. We leave the question distinctly open to be argued and decided if it should in any case hereafter be necessary to decide it. But we are clearly of opinion that, where a commissioned officer accepts an appointment to serve

[1] *Vertue* v. *Lord Clive*, 4 Burr. 2472. [2] 19 Q. B. D. 13.
[3] 29 & 30 Vict. c. 109, s. 19.

in one of Her Majesty's ships in commission, and enters upon the performance of his duties, he subjects himself to the provisions of the Naval Discipline Act, and cannot at his own will and pleasure resign his appointment, and may be tried by Court-martial for any of the offences specified in the Act.'

(b) *The Territorial and Reserve Forces.*

The Territorial and Reserve Forces Act.

Until the Act of 1907 came into operation the Reserves and the Auxiliary Forces were distinct bodies, yet in some respects confused. The Reserve Force was provided under the Reserve Forces Act of 1882, and consisted, in part, of men who had served in the regular army[1], and in part also of a militia reserve consisting of such militiamen as were willing to enlist as militia reservists for a prescribed period[2].

The Auxiliary Forces consisted of the Militia, the Yeomanry, and the Volunteers.

The policy of the War Office, under Mr. Haldane, partly embodied in the legislation of 1907, is to constitute a fighting force on two lines; the first being the Regular Army, the striking force; the second the Territorial and Reserve Force, which should absorb the existing Reserve, the Militia, the Yeomanry, and the Volunteers. The Territorial and Reserve Forces Act, 1907, aggregates the various forms of local and auxiliary force under county associations, ninety-three in number, over which the Lord Lieutenants should preside, and to which, subject to the provisions of the Act, and to the plans and orders of the Army Council, belongs the task of organizing the Territorial Force.

It is hardly possible to describe a scheme which is at present in course of development; but we may describe the old Auxiliary Forces affected by the scheme, and may indicate what will become of them under the Territorial and Reserve Forces Act.

The Militia force,

The Militia represented the general levy, the control of which force, together with the appointments of lieutenants of counties, proved the final cause of quarrel between

[1] 45 & 46 Vict. c. 48. [2] 45 & 46 Vict. c. 49.

after the Restoration: Charles I and the Long Parliament. The Restoration Parliament was careful to recognize the right of the King to the command of the Militia [1]: but it also required him to appoint lieutenants of counties throughout the kingdom, with power to commission officers, raise men, and organize training. Under these Acts the supply of men, horses, and arms was a liability resting on property: and the practical control was vested in the Lord Lieutenant [2].

When Mutiny Acts were passed, the Militia was exempt from them, and the force fell into inefficiency until its

after 1757; revival in 1757. In that year the old law was greatly changed. The liability to provide for the Militia became local. A statutory duty was laid on each county to provide a certain number of men; lists of all the men in each parish between the ages of 18 and 60 were sent to the Lord Lieutenant of the county. The quota of each district was settled, and the men who should serve were chosen by ballot.

After the peace of 1815 the liability was relaxed. From 1829 onwards the ballot has been suspended by Statute, unless the King should by Order in Council put it in force, and the Militia was re-constituted on a different footing in 1852.

since 1852: It was thenceforth raised by voluntary enlistment, the ballot being kept in reserve in case the number of men provided by Parliament should not be forthcoming [3]. In 1855 it was taken from the control of the Home Secretary, under whose charge this force had always been until it was embodied. Henceforth the force was placed under the control of the Secretary of State, who by the Army Regulation Act of 1871 became responsible for the exercise of the powers of the Crown as regards the government, pay, and discipline of the Militia [4]. The Lord Lieutenants of the counties thenceforth only retained the right to nominate to first commissions. The Militia Act of 1882 [5] consolidated most of the enactments which affect the force.

[1] 13 Car. II, st. 1, c. 6. [2] 14 Car. II, c. 3; 15 Car. II, c. 4.
[3] 23 & 24 Vict. c. 120.
[4] 34 & 35 Vict. c. 86, Part ii. [5] 45 & 46 Vict. c. 49.

What then were the liabilities of the Militia? Enlistment took place in the same manner as that of the regular soldier. The recruit was required to undergo a preliminary training fixed by the regulations, and a subsequent training of from 21 to 28 days. The King might by Order in Council cause the Militia to be embodied in case of grave national danger, but the militiaman could not be required to serve out of the United Kingdom. Parliament, if not sitting, must be summoned to meet within ten days of such embodiment. When acting with the regular forces in their training or during embodiment the militiaman was subject to military law. The militia officer was always so subject. present liabilities.

It is well to set forth the statutory liabilities of the Militia because the Acts affecting the force have not been repealed: but the Militia, as such, has ceased to exist. The ballot continues to be suspended by Statute, and the power given by the Act of 1882 to enlist men for the Militia will no longer be exercised. The Reserve Forces Act of 1882 is by the Act of 1907 extended in its operation to the enlistment of men, who have not served in the regular forces, as special reservists[1]; and the King has power by Order in Council to transfer battalions of the Militia to the Special Reserve. This affects the greater portion of the existing battalions, and these will therefore retain their identity as a part of the Special Reserve. The special reservist.

The Yeomanry and the Volunteers were alike in that they were bodies of volunteer troops, unlimited as to number, that the Crown was empowered by Statute[2] to accept their services, and that they were liable to be called out for military service in Great Britain in case of actual or apprehended invasion. But the Yeomanry is a cavalry force; the Volunteers were composed in part of light horse, artillery, and engineers, but mainly of riflemen. The The Yeomanry and Volunteers.

[1] 7 Ed. VII, c. 9, s. 34.

[2] 44 Geo. III, c. 54. The Act applied to volunteer infantry, but was repealed as to these by the Act of 1863 (26 & 27 Vict. c. 65), which with the Regulation of Forces Act 1881 (44 & 45 Vict. c. 57, s. 9) governed the Volunteer Corps.

Yeomanry are required to train for a certain number of days in each year in order to be effective: and during that time are subject to military law. The Volunteers were only subject to military law while being exercised with regular troops or with the Militia when the latter were so subject [1]. The Yeomanry might be called upon to suppress a riot: not so the Volunteers. Neither Yeomanry nor Volunteers exist in Ireland.

The Act of 1907.

The Yeomanry will not be affected by the Act of 1907 for three years, but they will then fall under the operation of the Act, and if they enlist under its terms will become the mounted branch of the force in their respective counties. The Volunteers, or so many of them as are willing to join under the new conditions, have already passed into the Territorial Force.

These conditions are set forth in detail in the Act, and it is enough here to note the armed forces which exist, or whose existence is contemplated, at the present time. We have first the Regular Army as described above. Behind the Regular Army is the Reserve, constituted under the Reserve Forces Act of 1882, of men enlisted into the Reserve who have already served in the regular forces, and of the Special Reserve of the Act of 1907, which may largely consist of what was once the Militia. Of this Reserve some enlist on the terms that they may, and some that they may not, be called upon to serve outside the United Kingdom. But the calling out of the Reserves, other than the Special Reserve [2], involves the immediate summons of Parliament if Parliament is not sitting at the time [3], in order that the crisis which has necessitated the calling out of the Reserves may be explained to the two Houses.

The Reserve.

The Territorial Force.

Beyond the Reserve is the Territorial Force, liable to serve in any part, but not outside, of the United Kingdom. This force is to be organized in every county by an association, formed for the purpose under the presidency of the Lord Lieutenant, with power to make the necessary admin-

[1] 44 & 45 Vict. c. 58, s. 176. [2] 7 Ed. VII, c. 9, s. 32.
[3] 45 & 46 Vict. c. 48.

istrative arrangements, under the guidance and control of the Army Council. The force itself is regulated, apart from the express enactments of 7 Ed. VII. c. 9, as to government, pay, and discipline, by royal orders made on the advice of the Secretary of State for War.

Into this force the Yeomanry will be, and the Volunteers are absorbed—as the Militia are absorbed into the Special Reserve—to revive, it is hoped, as a great territorial army completely organized for national defence.

(c) *The discipline of the Army.*

Troops on active service were from an early date in our history governed by Articles of War, issued by the King himself or by an officer commissioned by him. They were administered in the Court of the Constable and Marshal, which, as Hale tells us [1], Articles of War.

'dealt with the offences and miscarriages of soldiers contrary to the laws and rules of the army: for always *preparatory to an actual war* the Kings of this realm by advice of the Constable and Marshal were used to compose a book of rules and orders for the due order and discipline of their officers and soldiers together with certain penalties on the offenders; and this was called Martial Law.'

This jurisdiction was probably exercised by officers in military command in virtue of commissions from the Crown, and was unaffected when the office of High Constable became extinct; from these commissions grew the courts for dealing with offences so created, which we know as *Courts-martial.* Courts-martial.

But Articles of War, as is indicated by the words in italics, were only in force in actual war. When a military force was made lawful by the Mutiny Acts it was necessary to secure discipline under all conditions of active service, war, or peace. For insubordination there was no remedy except when troops were on active service in time of war, and though desertion had been made a felony in the case The royal prerogative;

[1] Hale, History of the Common Law, 40.

of men under contract or indenture to serve the Crown[1], the deserter could be punished only in the ordinary courts.

how extended by Mutiny Acts.

The first Mutiny Acts were intended to do no more than supplement the prerogative right to make articles of war *in time of war*; they made mutiny and desertion punishable with death, and gave a statutory power to the Crown to commission courts-martial to deal with such offences in the case of troops not on active service. They did not give to the King the power to make articles of war, that is a special code of offences and punishments, beyond his existing prerogative, and applicable alike in time of war and peace. But the Mutiny Acts of 1715 and subsequent years gave power to the King to make articles of war for the troops in the United Kingdom and in his other dominions *in time of peace*; and after 1803 this power was extended to troops outside the dominions of the Crown, and so covered the case of troops on active service.

Thus the prerogative of the Crown was embodied and extended in the statutory powers conferred by the Mutiny Acts, and in virtue of these powers were articles of war made and enforced in peace and war until 1879.

The Army Act.

In that year the provisions of the Mutiny Act and of the Articles of War were consolidated into a code of military law[2]. This code was amended in 1881 and is now re-enacted every year, for one year, under the title of the Army Act[3]. It is worth while to note some features of this Act

(1) The preamble recites the clause of the Bill of Rights directed against the raising or keeping a standing army in the time of peace, and proceeds to recite the necessity, for the safety of the United Kingdom and the defence of the possessions of His Majesty's Crown, that a body of forces

[1] 7 Hen. VII, c. 1, s. 2; 3 Hen. VIII, c. 5; 4 & 5 Ph. & Mary, c. 3, s. 9.

[2] For an account of the circumstances which led to this codification of military law, see the speech of Colonel Stanley introducing the Bill. Hansard, ccxliii. 1910.

[3] The effect of the substitution of the present Army Act for the old Mutiny Act is to bring the entire code of military law annually under the consideration of Parliament, which no longer gives power to make rules and constitute Courts, but enacts the rules, provides the jurisdiction for enforcing them, and the punishments for their breach.

should be continued, and that it should be of a certain number (190,000 for 1907), and also a body of marines.

(2) It then recites the provisions of mediaeval statutes that 'no man can be forejudged of life or limb or subjected in time of peace to any kind of punishment within this realm by martial law, or in any other manner than by the judgment of his peers and according to the known and established laws of the realm,' and proceeds to state the necessity, 'for retaining the *before-mentioned forces and other persons subject to military law* in their duty, that an exact discipline be observed,' and that persons who act to the prejudice of good order and military discipline 'be brought to a more exemplary and speedy punishment than the usual forms of the law will allow.'

(3) It then re-enacts the Army Act of 1881 for specified times throughout the entirety of the King's dominions.

Persons to whom it applies.

(4) The Act applies to all persons subject to *military law*, and these are not limited to the number of men specified in the preamble. They include the marines when not subject to the 'laws relating to the government of His Majesty's forces at sea,' the British troops serving in India, and, under statutory conditions as to time and circumstances, the other armed forces of the Crown within and without the King's dominions.

§ 3. *The Composition and discipline of the Navy.*

Numbers of Naval force: how settled.

The navy, unlike the army, has never been suspected by the Legislature. Its existence has been taken for granted. The maintenance of its numbers by the arbitrary mode of impressment has never been declared unlawful, though the exercise of this prerogative would undoubtedly be called in question if called into use at the present day. The numbers of the naval force are therefore determined by the requirements of the Admiralty, sanctioned by the Chancellor of the Exchequer, and met by vote of the House of Commons.

Terms of service.

Like the soldier, the sailor engages himself to the service of the Crown for a certain time, but may be dismissed before that time has expired.

The officer in the navy, like the officer in the army, when he accepts the King's commission, places himself at the disposal of the Crown; his services may be dispensed with, but he cannot terminate them at his own pleasure.

Provisions for discipline.

The discipline of the navy was maintained, in its origin, by orders issued from time to time by the admiral of the fleet in virtue of royal orders or a royal commission. The first Lord High Admiral of England was Sir Thomas Beaufort in 1408. Until that time the command of the various fleets had not been entrusted to one man, nor indeed was the fleet a regularly organized institution. The Cinque Ports were liable for the defence of the narrow seas, and beyond this, fleets were collected, manned and disciplined, as occasion might require.

The jurisdiction of the Lord High Admiral and his Court may be dealt with hereafter; it is wholly distinct from the code of rules passed for the maintenance of discipline.

Royal prerogative.

Under the Tudors the navy became a permanent force, belonging to the Crown and governed by the Crown. In the reign of Charles I the office of Lord High Admiral was for the first time put into commission. The sailors who manned the fleet were governed by regulations made by the admiral in command, enforced by the captains under his instructions, and neither seen nor approved by Parliament.

The first attempt to organize the discipline of the navy was made by the Long Parliament[1]: and under the Commonwealth ordinances were drawn up and the constitution of naval Courts-martial was carefully framed so as to include all ranks[2].

Parliamentary control.

After the Restoration, Parliament retained its control over naval discipline. In 1661 was passed an Act for establishing discipline in the navy. The Act[3] defines a number of offences and their punishments, and gives power to the Lord High Admiral to issue commissions for holding Courts-martial, limiting the jurisdiction to offences on the high seas, or in great rivers below bridges, committed

[1] Lords' Journals, vii. 255. [2] Thring, Criminal Law of the Navy, 31.
[3] 13 Car. II, c. 9.

by persons in actual service in the King's fleet. In 1748 and 1749 these rules were amended in some respects, and extended to shipwrecked crews, and to offences, under the Acts, committed on shore out of the dominions of the Crown. Changes have been made from time to time in this code of discipline and procedure for the navy, but as a whole it has remained a permanent Statute. Parliament has never feared to contemplate the continued existence of the navy, and hence the contrast between the temporary character of the Mutiny Act and the permanence of the Naval Discipline Act. The law which now governs the navy is the Naval Discipline Act of 1866. Part 1 of this Act is described as consisting of *articles of war*; a sailor therefore, like a soldier, may be regarded as a person subject to military law.

29 & 30 Vict. c. 109.

§ 4. *Persons subject to Military Law.*

Liabilities of soldier and sailor

The soldier and sailor alike are subject to the ordinary law of the land. While within the jurisdiction of the ordinary courts they can be tried and punished for offences against the criminal law, they can be sued for liabilities[1] incurred under the civil law, and they acquire no immunity by reason of their engagement in the service of the Crown.

to criminal law,

But the criminal law of this country follows them into places where it would not reach other subjects of the Crown: for it may be administered by Courts-martial within and without the jurisdiction of the Courts. This power of administering the ordinary criminal law is limited by the rules that certain offences may not be tried by Court-martial, if committed out of the United Kingdom but within the dominions of the Crown, unless the offender is on active service or the offence be committed 100 miles

[1] But the soldier cannot be arrested or compelled to appear before a court on account of any debt, damages, or sum of money under £30. The creditor may sue and get execution of the soldier's goods so long as he does not deprive the Crown of the soldier's services or 'touch the person, pay, or military equipment of the soldier.' Manual of Military Law, 287.

or more from a competent civil court: and that under no circumstances can a Court-martial oust the jurisdiction of the civil courts over such offences.

to military law, And in addition to a liability to the criminal law of the land, which is more extensive than that of the citizen, the Army Act and the Naval Discipline Act provide for the soldier and the sailor rules of conduct and a procedure for their enforcement different in character to the rules and procedure of the ordinary law.

The soldier and sailor are therefore *persons subject to military law* [1]. They are liable to arrest and confinement on being charged with an offence against that law, and pending investigation, and if below a certain rank in either service, may be punished for minor offences under summary powers possessed by officers in command [2].

Courts-martial. For offences against military law they are triable by Courts-martial; the offences so triable and the procedure in respect of them are carefully defined in the Acts to which I have referred. But Courts-martial are strictly limited to the powers conferred upon them by Statute, and the relation of the Law Courts to them in this respect must be noted.

Securities Persons administering military law may exceed their jurisdiction in two ways. They may apply military law to persons not subject to that law. Or they may misapply

[1] It is merely necessary here to call attention, and no more, to the distinction between military law and what is called 'martial law.' Military law is the code under which the soldier and the sailor live, and to which they subject themselves during such time as they continue in their professions. Martial law is nothing more than an extension of the right to the use of force for purposes of self-protection. In self-defence a man may inflict bodily injury or may even take life, and successfully justify his action. For the safety of the community it may be necessary to supersede the ordinary course of law and the action of the Courts. Those who represent the executive under such circumstances may be called on to justify their action in a court of law by individuals who have suffered at their hands, or at the bar of public opinion, if their use of force was in excess of what the circumstances made necessary. See on this point *Phillips* v. *Eyre*, L. R. 6 Q. B., pp. 15, 16.

[2] This power exists as to soldiers partly under s. 45 of the Army Act, partly under the King's Regulations in respect of minor punishments, such as confinement to barracks, &c. As to sailors, it appears to be authorized by the Naval Discipline Act, s. 52 (11) and s. 53.

military law in cases of persons who are subject to it,—as if a soldier were tried by Court-martial for murder in the United Kingdom, or the sentence of a Court-martial were confirmed by an officer who had no authority to confirm it.

against excess of jurisdiction;

The remedies for such excess of jurisdiction are by writs of Prohibition, of Certiorari, of Habeas Corpus, issuing from the High Court of Justice. The holding of a trial or the infliction of a sentence may be restrained by a writ of Prohibition, a sentence may be quashed or a matter brought up to the High Court to be dealt with by writ of Certiorari; one who is deprived of his liberty wrongfully may recover it by writ of Habeas Corpus. Beyond this the Courts will give a remedy in damages to persons who have suffered by the application of military law without jurisdiction.

The cases may be thus grouped under three heads: (1) the case of a civilian tried and punished by military law, (2) the case of a person subject to military law punished without trial or tried and punished without jurisdiction, and (3) cases in which jurisdiction exists but the plaintiff alleges that the law has been put in force against him either without reasonable cause or wrongfully and maliciously.

against improper exercise of jurisdiction.

As regards these last it is well to seek some general rule, and the rule may be thus stated. Where an officer in the exercise of his discretion and in the course of his duty brings before a military tribunal a person who is subject to military law, Courts of law will not inquire into the reasonableness of the charge, even though it should have been proved at the trial to be unfounded.

Sutton v. *Johnstone*[1].

Captain Sutton was ordered by his commanding officer, Commodore Johnstone, when in sight of the enemy, to slip his cable and engage the French fleet. He disobeyed this order, and Johnstone brought him before a Court-martial. It was there proved that his disobedience was not wilful but arose from the condition of his ship, which made his obedience to the order a physical impossibility. He was therefore honourably acquitted. He brought an action

[1] 1 T. R. 541.

against Johnstone and obtained a verdict for £6,000 damages, which was sustained in the Court of Exchequer on a motion for arrest of judgment. But this decision was reversed in the Court of Exchequer Chamber, mainly on the ground that the defendant had 'probable cause' for bringing the plaintiff to trial. But the Court went further, and expressed an opinion that even if the proceedings in the Court-martial had been instituted without probable cause, Courts of law would not interfere with the discretion of an officer acting in a matter of discipline.

With malice.

It remains to consider the position of a person subject to military law against whom proceedings are instituted not merely without probable cause, but with malice. On this point we may state the law to be as follows.

The general rule which protects witnesses from action for defamatory statements made in the course of their evidence applies to evidence given before Courts-martial. And further, the Courts will not interfere even where the discretion of an officer has been influenced in its exercise by a malicious motive.

Dawkins v. *Lord Rokeby*[1].

Dawkins v. *Paulet*[2].

Lord F. Paulet in the course of his duty made statements concerning Colonel Dawkins which were intended to be forwarded to the Commander-in-Chief. Colonel Dawkins brought an action for defamation, alleging that these statements were not merely false but malicious. The case for the defence was argued upon a demurrer, that is to say, the truth of the allegations was not traversed; but it was maintained that the statements, even though false and malicious, disclosed no cause of action because they were made in the course of military duty. This view was sustained by the majority of the Court: but some weight was given to a provision in the articles of war[3], that an officer who considers himself to be wronged might complain to the Commander-in-Chief. There was therefore a military remedy for the breach or misperformance of a military duty. It may be open to question whether the

[1] L. R. 8 Q. B. 251; L. R. 7 H. L. 744. [2] L. R. 5 Q. B. 94.

[3] This provision is now introduced into the Army Act, 44 & 45 Vict. c. 58, s. 42. It is to be found also in the Naval Discipline Act, 29 & 30 Vict. c. 109, s. 37.

Courts would not find a remedy for an abuse of military procedure which was proved or admitted to be malicious, if the Army Act and Naval Discipline Act had not provided one.

Section II

The War Office and the Admiralty

§ 1. *The government of the army before* 1855.

Army management in 1850.

Before the Crimean war, and the changes in military administration to which that war gave rise, the control of the army, and of the appliances necessary to an army, exhibited a medley of conflicting jurisdictions. The system was almost unmanageable in time of war, but was supposed, in its dispersion of duties and powers, to ensure that the army was not dangerous to the constitution [1].

The Commander-in-Chief.

The Secretary at War.

The Commander-in-Chief was responsible to the Crown for the discipline of the army, for appointments, promotions, rewards and punishments. The Secretary at War, who was not a Secretary of State nor often a member of the Cabinet, was responsible to Parliament for the money voted for the army, for the security of the citizen against the soldier in person and property, and for the security of the soldier in respect of the fairness of the rules of military discipline which were embodied or authorized in the Mutiny Act.

The Home Office.

The Secretary of State for the Home Department was responsible for the Reserves and for the forces on the Home Establishment.

The War and Colonial Office.

The Secretary of State for War and the Colonies was responsible for the numbers of the army, for the general policy respecting it, and for the movement of troops on foreign or colonial service.

The Ordnance Board.

The Ordnance Board was a separate department, usually represented in Parliament by the Master-General of the

[1] The first chapter of Sir Robert Biddulph's 'Lord Cardwell at the War Office' sets out somewhat more fully the confusion of authorities which prevailed in 1854.

Ordnance, and responsible for the defences of the country, and for army and navy stores.

The Commissariat was a department of the Treasury.

The Board of General Officers, appointed by Royal Warrant in 1714, attended to the clothing of the Infantry and Cavalry[1].

The soldier, therefore, was fed by the Treasury, and armed by the Ordnance Board, while the Board of General Officers was responsible for the pattern of his clothing: the Home Secretary was responsible for his movements in his native country: the Colonial Secretary superintended his movements abroad: the Secretary at War took care that he was paid, and that the flogging which was provided for him by the Commander-in-Chief was administered in accordance with military law.

Causes of confusion.

The confusion of authorities was partly due to the desire of the Crown to retain as a source of political influence the prerogatives which it enjoyed in respect of the standing army, but mainly to the halting and reluctant steps by which the country admitted the standing army to be a part of its constitution. Any attempt by Ministers to harmonize these conflicting elements was liable to be met by objections from two quarters. The Crown was unwilling to subject its prerogatives to Parliamentary control; the Commons objected to the admission that a standing army was more than a temporary necessity.

But forasmuch as for 200 years Parliament has, with few breaks, legalized the existence of a standing army, provided for its discipline, voted money to pay for it, and taken care that this money is applied to the purposes for which it is voted, we may accept the army as a permanent institution, and ask, Who is responsible for its numbers and disposition, for the maintenance of its discipline, for asking Parliament for the necessary funds, and for their proper expenditure?

To reach, and to understand the present highly centralized organization of the War Office, we must work

[1] Clode, Military Forces of the Crown, ii. 568.

through the political departments which have been merged in it. They are four: the Ordnance Board; the Commissariat, as a branch of the Treasury; the office of Secretary at War; and that of Secretary of State, in so far as it was concerned with military matters. We must also note the various difficulties created by the office of the Commander-in-Chief.

(a) *The Ordnance Board.*

Duties of the Board.

The Ordnance Board should come first, as being the oldest of the military departments[1]. The *Ordnance* meant the defence of the country by means of fortresses, garrisons, and stores, these last being applicable alike to the army and navy. The right—the sole right—to maintain defensive works, such as castles and forts, was an undisputed branch of the royal prerogative: forts need guns, ammunition, and men, and the employment of these was a part of the discretionary power vested in the Crown for national defence. The Board was wholly separate from and independent of the office of Secretary at War, and separately responsible to Parliament for the money voted to its use. At the head of the Board was the Master-General of the Ordnance, an important member of the Government throughout the eighteenth century, and its chief adviser in military matters. He was Commander-in-Chief of the artillery and engineers, and presided at the Board of Ordnance, the duties of which had widely expanded since they were reorganized and defined in the reign of Charles II.

The Master-General.

Increase of duties.

These duties were at first limited to the charge of the King's forts for national defence, of the guns and stores for their use, and for the navy. As the army became a permanent and an increasing factor in the national expenditure, the business of keeping the necessary stores and entering into contracts for their supply grew in importance. The Board started in business on its own account, and established factories for the foundry of guns,

Factories.

[1] See as to the history of this Board, Clode, Military Forces of the Crown, chaps. i, xx.

the making of carriages, the supply of powder and of small arms. Then, too, it held on behalf of the Crown the sites of the royal forts, and during and after the reign of Anne received from time to time statutory powers for the acquisition of land for purposes of national defence. To the Ordnance Department also fell the duty of making an authoritative survey of the United Kingdom. The civilian who avails himself of this work for business or pleasure is apt to forget that he owes its existence to the needs of military topography.

Survey.

The duties of the Board, therefore, comprised the making and maintenance of forts, the acquisition and holding of land for that purpose, the purchasing, warehousing, and forwarding of stores, the manufacture of various articles for the use of the army, and the survey of the United Kingdom, which last is now transferred to the Board of Agriculture.

Abolition of the Board.

These duties were transferred early in 1855 to the Secretary of State for War: the Board, as a separate department, ceased to exist, and its Parliamentary powers were vested by Statute 'in the Principal Secretary of State, to whom the Queen has entrusted the Seals of the War Department [1].'

(b) *The Secretary at War.*

The office of Secretary at War dates from the reign of Charles II. Until the commencement of the present century its duties were ill defined, and their ambiguity is doubtless owing to the different points of view from which the army was regarded by the Crown and by Parliament.

Position of Secretary at War.

In the reigns of Charles II, James II, and William III, the Secretary at War, though appointed by commission and not by delivery of seals, acted in some respects as a Secretary of State. His counter-signature authenticated the sign-manual, and this on state papers which had not to do with the army [2].

But the Secretaries of State increased in power as

[1] 18 & 19 Vict. c. 117.

[2] Clode, Military Forces of the Crown, ii. 255.

Cabinet Government developed: not so the Secretary at War. And the difference is instructive. The united action of political leaders in Cabinet Government, and the tenure of office subject to the support of a Parliamentary majority, changed the Secretary of State from a mere mouthpiece of the Crown or the Privy Council into the independent head of a department responsible to Parliament as well as to the King for the discharge of the duties of his post.

A servant of the Crown.

But the Secretary at War did not enjoy the complete responsibility to Parliament which enhanced the position of the Secretary of State. The terms of his commission enabled him to contend that he was the servant of the King, or of the General of the Forces for the time being; that he was bound to carry out the orders given to him by his master, and was not bound to account to Parliament for what was done[1]. It did not suit either the King or those who professed most anxiety for the liberties of the people to enforce the Parliamentary responsibility of the Secretary at War. The one did not desire to see the exercise of his military prerogatives brought under the supervision of Parliament, the other would gladly be rid of the office and the army as well. The popular statesmen of the first half of the eighteenth century would have considered that in making the Secretary at War accountable to Parliament they were recognizing a standing army as a permanent part of the constitution.

Not responsible to Parliament.

His duties.

During the greater part of the last century the business of the Secretary at War was to communicate the King's pleasure in matters of military administration, to prepare for the King's signature and to countersign warrants on the authority of which the Treasury paid over to the Paymaster of the Forces the money voted by Parliament for the maintenance of the army. But in 1783 a definite Parliamentary responsibility was for the first time imposed

[1] Pulteney when Secretary at War in 1717 held that he was 'a ministerial not a constitutional officer, bound to issue orders according to the King's direction,' and so justified an execution of officers after the rebellion of 1715 which he knew at the time to be of doubtful legality, and which was in fact illegal.

Burke's Act.

upon the office[1]. Mr. Burke's Act required the Secretary at War to prepare estimates for Parliament in each year, to transmit the money when voted to the Paymaster of the Forces, and to receive and settle annually the accounts of expenditure.

In 1793 and 1794 two further changes in military administration took place, which had important effects on the office of Secretary at War.

In 1793 the office of General Commanding-in-Chief was established, and in 1794 a third Secretary of State was appointed for War.

Commander-in-Chief,

The establishment of a permanent Commander-in-Chief meant that the King gave up the personal command of the army: it meant also that in all matters relating to the internal discipline and regulation of the army the royal pleasure would henceforth be communicated, not by the

and dual control.

Secretary at War, but by the Commander-in-Chief. From this time arose the dual control of the army: the Horse Guards, side by side with the War Office.

What the Secretary of State for War took from the hands of the Secretary at War is not easy to define. It is generally described by Lord Palmerston as 'business of a political nature formerly transacted at the War Office[2].' Probably the Secretary at War had been used to submit to the Cabinet the proposed number and employment of the forces: these matters were henceforth settled by the Secretary of State, who left to the Secretary at War merely the preparation of estimates upon instructions received from the Cabinet. No doubt also, in the absence of any official of Cabinet rank responsible for the conduct of the War Office, the Secretary at War transacted business which would more properly have been dealt with by a Secretary of State. Thus in 1759 the Secretary at War conducted negotiations with the Court of France for an exchange of prisoners: in 1782 he refused the aid of the military to the civil power at an execution where dis-

Ambiguous position of Secretary at War.

As to Secretary of State.

[1] 22 Geo. III, c. 8; 23 Geo. III, c. 50.

[2] See Lord Palmerston's Memorandum on the Office of Secretary at War; Clode, ii. 713.

turbance was apprehended[1]. He might in fact enlarge his functions as in the case just cited, or he might, and sometimes did, minimize his responsibilities and deny all knowledge of anything connected with the army beyond the requirements of Burke's Act[2].

As to Commander-in-Chief.

But it was inevitable that a collision must occur between the Commander-in-Chief and the Secretary at War; between the Horse Guards and the War Office. Burke's Act of 1782 had thrown upon the Secretary at War definite duties and responsibilities to Parliament. The Commander-in-Chief considered that the entire control of military matters vested in him, as representing the King in army administration. He was disposed to regard the Secretary at War as a subordinate, entrusted with the duty of seeing that the law was observed as between soldier and citizen, and accounts balanced as between Parliament and the army. Lord Palmerston, who was Secretary at War in 1810, considered that his control of military finance and accounts entitled him to issue orders and regulations which the Commander-in-Chief, Sir David Dundas, regarded as acts of interference. The one asserted, the other denied, that the War Office was independent of the Horse Guards. Lord Palmerston supported his case in an exhaustive historical memorandum, and the matter was referred to the Cabinet. The financial control of the War Office was upheld, but the Secretary at War was desired by the Prince Regent not to issue any new order or regulation until it had been communicated to the Commander-in-Chief. If he objected the dispute was to be settled by an appeal to the First Lord of the Treasury, the Chancellor of the Exchequer, or the Secretary of State for War and the Colonies.

Collision in 1810.

The controversy is historically interesting as showing the slow degrees by which the royal prerogative in respect

[1] See Lord Palmerston's Memorandum on the Office of Secretary at War; Clode, ii. 698, 701–2.

[2] Parl. Hist., vol. xx. p. 1253. 'The Secretary at War (Jenkinson) declared he was no minister, and could not be supposed to have a competent knowledge of the destination of the army, and how the war was to be carried on.' December 9, 1779.

of the army accommodated itself to the theory of ministerial responsibility.

From this time onward the two departments worked side by side without further collision. Until the Crimean war the Secretary at War continued to prepare and submit estimates to Parliament, checked the details of military expenditure, was responsible for the provisions of the Mutiny Bill, for the due execution of military law, and for the security of civil rights, that is to say, it was his duty to see that the conditions under which the soldier entered the army were not unduly severe and that the soldier did not injure the citizen in person or property.

Abolition of the Secretary at War.

In February, 1855, the Secretary of State for War was commissioned to act also as Secretary at War, and in 1863 the office was abolished and its duties transferred to the Secretary of State[1].

(c) *The Commissariat.*

The Treasury and the Commissariat.

Of this department little need be said. Until the Crimean war the Treasury retained in its own hands the business of finding the army in food and forage, fuel and light. At home and abroad the officers of the Commissariat acting under the Commissioners of the Treasury made the contracts for these articles, supplied them to the troops, paid for them out of the sums voted by Parliament, and rendered accounts of the money received and paid. The system seems to have worked better than might have been expected, but at the general centralizing of military departments which took place during the Crimean war the Commissariat was handed over to the War Office.

(d) *The Secretary of State.*

The Secretary of State for War is the great officer of state who has absorbed the duties of so many departments. The office came into existence in 1794; in 1801 the business of the Colonies was added to it, and until June, 1854, its holder was responsible for this business as well as for the

[1] 26 & 27 Vict. c. 12.

number of the troops, their distribution, and matters of general policy respecting the army.

War and the Colonies.

The constitution of this office must at all times have been anomalous. Its holder had to deal with two great matters of State, Colonial administration and military policy, incongruous in themselves, and made more difficult of treatment by the extreme complexity of our military organization. For the Home Secretary had also a voice in the affairs of the army. He dealt with all matters of internal defence: commissions for all but Indian or Colonial corps were prepared at the Home Office and countersigned by the Home Secretary [1]. When arms were wanted for the soldiers the Commander-in-Chief stated his requirements to the Secretary at War, the Secretary at War requested the Secretary of State for the Home Department to communicate the needs of the Commander-in-Chief to the Ordnance Board, and so in due time the army got what it wanted.

Duties as to war.

In time of peace the Secretary of State for War and the Colonies had little more to do with the army than to submit to the King the advice of his ministers as to the number of the forces, to communicate the result to the Commander-in-Chief, to attend to the protection of our colonial possessions and to correspond with officers on colonial service. In time of war he was responsible for the measures adopted, other than those of internal defence, and was in communication with the officers in command on foreign service.

Unconnected with Secretary at War.

But the Secretary at War, who should naturally have been his subordinate, was wholly independent of the Secretary of State. The appointment of a Secretary of State for War was important as regards the constitution, because now for the first time the general policy of government as to the army was placed in the hands of a definite person holding office of the highest rank and responsible to Parliament. The Secretary at War, as we have seen, did not think himself responsible for anything more than the payment and discipline of the soldiers, and their observance of the law of the land.

[1] Clode, ii. 70.

The vague and partial character of the control which the Secretary of State for War and the Colonies exercised over military matters, extended to his Parliamentary responsibility. The dispersion of duties over so many departments led to mismanagement in time of war, and it was hard to say which, if any, of the departments was to blame for faults which sprang not so much from their conduct as their constitution.

Reforms of 1854 and 1855.

In 1854 a fourth Secretary of State was appointed for War, and to him were shortly assigned the duties of all the departments with which I have just dealt. In 1855 he was made Secretary at War as well as Secretary of State, then the Commissariat was transferred to the War Office, then the Board of Ordnance disappeared, and its duties were handed to the same department. In the same year the Board of General Officers, which had been responsible for the inspection of clothing, and the Army Medical department were absorbed in the War Office, and in the following year arrangements were made that the military accounts should be audited in this same office by auditors responsible to the Commissioners of Audit.

Thus the Secretary of State for War, assisted by a Parliamentary Under Secretary of State and a permanent staff, became directly responsible for the entire civil administration of the army. The Commander-in-Chief still enjoyed an independent military control, but the Secretary of State was responsible to Parliament for the exercise of this control.

§ 2. *The government of the army from* 1855 *to* 1870.

Overwhelming duties of Secretary of State.

But the premature centralization of 1855 was not the end of changes in the administration of military affairs. It threw upon one man the duties of three departments, while it left his relations to the Commander-in-Chief as indefinite as they had been in the days of the Secretary at War. Soon it became clear that the Secretary of State could not discharge the combined duties of the legal and financial departments, supervise the manufacture or provision of

the necessaries for the Ordnance and the Commissariat Departments, and assume a general responsibility for the policy of army administration.

Then the work of decentralization began, not in the sense of restoring the independent departments, whose separate action and responsibility had paralysed military operations in the Crimean war, but rather with a view to the logical and scientific apportionment of duties to those most competent to discharge them, in such a way that while the Secretary of State remains responsible for all and everything that is done by or in respect of the land forces of the empire, he is as little as possible encumbered with the detail of the various departments of the great military machine. First in 1868 a Controller-in-Chief was appointed, who should be a permanent officer, responsible to the Secretary of State for the supply and transport of the army. Then in 1869 Mr. Secretary Cardwell found that there was further need of Parliamentary assistance, for the Under Secretary of State represented the War Office in the other House. In that year he tried to meet the difficulty by obtaining the assistance of one of the Lords of the Treasury, called for the time the 'War Lord.' But in 1870 it became necessary to take further steps to apportion the work of the office and to define the relations of the Secretary of State and Commander-in-Chief. Attempts at division of labour.

Between 1855 and 1870, though the responsibility of the Secretary of State for all matters relating to the army was fully recognized, there was still something in the nature of dual Government. Until 1861 a supplementary patent was issued to the Secretary of State on his appointment, in which military command and discipline and military appointments were reserved to the General Commanding-in-chief, 'subject to the responsibility of the Secretary of State.' The two offices, the Horse Guards and the War Office, were distinct, and the officials of the former were responsible to the Commander-in-Chief. The survival of dual control.

To make the Commander-in-Chief a part of the War Office organization, and at the same time to effect such a division of labour as would relieve the Secretary of State

and ensure due attention to the great departments of official business, Mr. Cardwell had recourse to a statutory distribution of duties into three departments.

The threefold division.

These departments were, (1) *Military*, under the Commander-in-Chief, who would hold his office irrespective of party changes. To him were entrusted all matters of military command and discipline, of qualifications for appointment and promotion: the supervision of the reserve and auxiliary forces, and the department of military intelligence; (2) *Ordnance*, represented by a Surveyor-General of Ordnance, responsible for commissariat and transport, stores and munitions of war, barracks and transport; and (3) *Finance*, represented by a Financial Secretary, responsible for the preparation of the estimates, the amount of money expended, and for proposals for any redistribution of money allotted to different votes for services. Both these officers were chosen by the Secretary of State for War, held office at his pleasure, and were eligible for seats in the House of Commons. All three departments were under the ultimate control of the Secretary of State, who was generally responsible for military affairs; their duties were prescribed by an Order in Council, and the relation of the Commander-in-Chief to the Secretary of State was by the same order defined as one of complete subordination[1].

§ 3. *The War Office since* 1870.

(a) *The duties of the Secretary of State.*

Duties of Secretary of State, as to condition and discipline of army,

From this time forward there has been no question of separate responsibility or independence on the part of the Commander-in-Chief. The problems to be solved are the best distribution of the business of the office with a view to its efficient conduct and the best means of securing that the most skilled advice on all matters concerning the army is always available for the Secretary of State; for the Secretary of State for War is responsible for things different in character, and sometimes even conflicting.

[1] 33 & 34 Vict. c. 17; and see Order in Council, June 4, 1870; Parliamentary Papers [c. 164] for 1870. See also Biddulph's Lord Cardwell at the War Office, pp. 238–40.

He must decide what may be called political questions concerning the army, the conduct of a war, the dispatch of troops at any moment to any part of the King's dominions, the relations of soldier and citizen, the maintenance of discipline, and the securities for efficiency by systems of promotion and compulsory retirement.

forts and commissariat,

He is responsible for the fortifications and commissariat being in such a state of preparation that we may be ready for defence or attack at any time.

materials of war,

He must follow the march of science in the invention of instruments of destruction, must ensure that our cannon, small arms, and ammunition are of the newest and best, and that we have enough. He must be able to decide business questions arising in connexion with the great factories in which the State manufactures the munitions of war. He is responsible for the finance of the army, that is, for the annual demand and outlay of more than thirty millions.

finance.

His preparation for them.

His office would be most exacting even if he came to it in possession of special knowledge and was familiar with every department of military affairs, or was able to give his exclusive attention to his duties. But none of these conditions is fulfilled. We require our statesmen to be as versatile as our troops: the latter are expected to serve in all climates and under all conditions, the former to undertake the administration of any department of government, and both are expected to be ready at the shortest possible notice.

The Secretary of State for War is certainly not selected for that office by the Prime Minister because of his military experience or scientific attainment. Aptitude for debate and a reputation for business capacity are the essentials: anything more than this must be a matter of chance.

His duties in Parliament;

Nor has the minister thus burdened with novel duties the power of giving his exclusive attention to them. He is a member of Parliament, generally of the House of Commons, and then he has a constituency to please. As a member of the Cabinet he must attend to the political questions of the day, and may be called upon to support his colleagues in debate.

in the Cabinet.

(b) *The division of labour.*

Assistance in Parliament.

How then is the Secretary of State enabled to discharge his vast and multiform responsibilities? Lord Cardwell, while constituting various departments for important branches of military service, concentrated the work under three administrative officers responsible to himself. These were the Commander-in-Chief, the Surveyor-General of Ordnance, and the Financial Secretary; the duties of these officers have already been described.

The Financial Secretary.

The Under Secretary represented the War Office in the House of which the Secretary of State was not a member, while the Financial Secretary was, and the Surveyor-General was intended to be, a member of the House of Commons.

The Surveyor-General.

The office of Surveyor-General did not fulfil the intention of Lord Cardwell. It had been expected that this office would be held by a soldier of rank and experience, who should assist the Secretary of State and the House of Commons as an exponent of the best professional opinion on military matters. But during the eighteen years of its existence it was only twice filled by a soldier of the qualifications contemplated, and on one of these occasions the holder was not in Parliament. In 1887 it was found that the Surveyor-General was rarely able to form a skilled opinion of his own on the business of his department, and that he was merely the Parliamentary mouthpiece of the military men who were responsible for its various branches.

The Order of 1888.

The office was therefore abolished, and an Order in Council of February 21, 1888, when Mr. Stanhope held the seals of the War Office, redistributed the business of the department, dividing it into a *Military* side and a *Civil* side, both subject to the administrative control of the Secretary of State as responsible for the exercise of the royal prerogative in respect of the army.

The Military side.

The Civil side.

By this Order the Commander-in-Chief was made solely responsible for advising the Secretary of State on all military matters, while on the Civil side the Financial Secretary was charged with all matters relating to ex-

penditure, account and audit, to the payment of money, and the control of manufacturing departments.

The report of Lord Hartington's Commission issued on March 20, 1890[1], contains the recommendations on which our present system of army administration is based. It was there pointed out that the duties thrown upon the Commander-in-Chief were so heavy and various as to make their adequate discharge practically impossible. He was alone responsible to the Secretary of State for advice on all military matters: the officers entrusted with the administration of important branches of military service, some involving a large expenditure of money, were responsible to the Commander-in-Chief; while the Commander-in-Chief was burdened with duties heretofore discharged by the Surveyor-General of Ordnance, as well as with the preparation of estimates for the services of the year. The Hartington Commission.

An officer in whom all military responsibility was concentrated, who alone communicated advice on military matters to the Secretary of State, who was charged also with important administrative duties, and who enjoyed the right of direct access to the Sovereign, occupied a position which tended to impair the constitutional responsibility of the Secretary of State.

The Commission recommended that the office of Commander-in-Chief should not be a permanent part of our military system, but that the Secretary of State should be assisted by the advice of certain principal military officers whose executive duties should not be so heavy as to conflict with their work as a consultative body, while the Commander-in-Chief should give place to a Chief of the Staff who should advise on all questions of military policy.

In 1895[2] the recommendations of this Commission were imperfectly put into operation. The office of Commander-in-Chief was retained, but its duties lightened, and its responsibilities to some extent dispersed. The heads of four great branches of the service were made responsible The Order of 1895.

[1] Report on Civil and Professional Administration of the Naval and Military Departments, 1890 [C. 5979].

[2] Order in Council, Nov. 21, 1895.

for the preparation and submission of estimates for their respective departments, and for advice given to the Secretary of State on all questions connected with the duties of those departments. The disposition of duties was then as follows[1]:—

The Commander-in-Chief.

The Commander-in-Chief was entrusted with a general control over the military forces of the Crown at home and abroad, and a general supervision of the military departments of the War Office. He was charged with the general distribution of the army, with the preparation of plans for its mobilization, and for offensive and defensive operations, with the collection of military information, with appointments, promotions, honours and rewards. He became the *principal adviser* of the Secretary of State on all military questions.

The Adjutant-General.

The Adjutant-General was charged with discipline, military education and training, with enlistment and discharge.

The Quartermaster-General.

The Quartermaster-General was charged with the supply of food, forage, fuel and light, with transport by land and water, and with administering the non-combative services of the army.

Inspector-General of Ordnance;

To the Inspector-General of Ordnance was assigned the provision of warlike stores and equipment, the inspection of these stores, the consideration of questions of new arms and their patterns and designs, the administration of the services connected with the Ordnance.

of Fortifications.

The Inspector-General of Fortifications was concerned with fortifications, barracks, and buildings for stores, with military railways and telegraphs, and the custody of land belonging to the War Office.

Summary of duties.

Shortly, one may say that the Adjutant-General provided the soldier, that the Quartermaster-General fed him and moved him about, that the Inspector-General of Ordnance armed him, and that the Inspector-General of Fortifications found him shelter in war and peace.

[1] I have set out this distribution of duties at length because it very nearly corresponds with the present distribution. The Chief of the Staff is substituted for the Commander-in-Chief and takes over from the Adjutant-General the subject of Military Education. The Inspector-General of Ordnance becomes the Master of Ordnance and absorbs the duties of the Inspector-General of Fortifications.

The changes of 1895 proved insufficient to secure that our military policy was well planned, that the best advice was always at the service of the Secretary of State, or that the organization of the department was adapted to meet the strain of war on a large scale.

The office of Commander-in-Chief a difficulty.

The office of Commander-in-Chief, with its great position and its various duties, was the main obstacle to any satisfactory readjustment of business. He exercised a general supervision, and therefore was under a general responsibility: the other military officers, whose duty it was to advise the Secretary of State on their respective departments, were neither independent of the Commander-in-Chief nor subordinate to him in their relations with the responsible head of the office: 'supervision' was a general and somewhat vague term, and in 1901 Lord Wolseley, whose term of office as Commander-in-Chief was then about to expire, addressed a memorandum[1] to the Prime Minister pointing out some of the difficulties of the position, which might be summed up in one sentence of the memorandum—'the Commander-in-Chief does not have effective control, while the heads of departments are not fully responsible.' It is true, as was pointed out by Lord Lansdowne[2], that supervision might be construed so as to give to the Commander-in-Chief all the right of intervention that he could require, and that his position as the chief military adviser of the Secretary of State, coupled with this right of supervision, gave to his office all the importance in which he thought it to be lacking.

Changes of 1901.

But though Lord Wolseley's objections were met to some extent by an Order in Council which brought certain officers[3] under the *control* instead of the *supervision* of the Commander-in-Chief, the difficulties which the existence of the office created were insurmountable.

[1] 1901 [Cd. 512]. [2] Ibid. p. 5.

[3] These were the Adjutant-General, the Director-General of Mobilization and Military Intelligence, and the Military Secretary. Order in Council, November 4, 1901. For a full account of these changes see Appendix to Report of Royal Commission on War in South Africa, pp. 269–96.

The War Office Council.

The great officers mentioned above, with the addition of others, met at first from time to time, afterwards weekly, under the presidency of the Secretary of State, as a War Office Council, to consider such matters as he might refer to them or as individual members might suggest: while another advisory body, the Army Board, presided over by the Commander-in-Chief, considered proposals for estimates, questions of promotion in the higher ranks of the Army, and, during the war, the details of mobilization.

The Army Board.

Both the War Office Council and the Army Board underwent various changes between the years 1895 and 1903, in composition and in duties, but the Commission appointed to inquire into the war in South Africa was clearly of opinion that 'the want of consultative power' was still a defect in the administration of the War Office, that the various Committees and Boards created within the office for advisory purposes had been too numerous and indeterminate in their functions, and that the War Office Council stood in need of definition as to its duty and of permanence as to its character[1].

The Committee of 1903.

At the commencement of 1904 the War Office (Reconstitution) Committee[2], appointed in the previous autumn, issued a series of reports which reiterated in a curt and dogmatic form the recommendations of the Hartington Commission of 1890. The chief of these recommendations, which was at once brought into effect, was the creation of an Army Council, corresponding in character to the Board of Admiralty. The office of Commander-in-Chief was abolished and that of Chief of the Staff created, an officer to whom were entrusted the subjects of military intelligence and mobilization, military education and training.

Army Council

created by Letters Patent.

Thus was a great change effected in the administration of the Army. By Letters Patent of February 6, 1904, all power and authority exercised under Royal Prerogative by the Secretary of State or the Commander-in-Chief was henceforth to be exercised by a Council, consisting of three

[1] Report of Commission on War in South Africa [Cd. 1789], pp. 132–43.

[2] 1904 [Cd. 1932], [Cd. 1968], [Cd. 2002].

civil members—the Secretary of State, the Parliamentary Under Secretary, and the Financial Secretary—and four military members. The Secretary of State is responsible for everything, and empowered to assign their various duties to the members of the Council [1].

Professional members.

To the Chief of the Staff were assigned, as above described, the subjects of intelligence, mobilization, education, and training: to the Adjutant-General the subjects of discipline, enlistment, discharge, and medical and sanitary matters: to the Quartermaster-General questions concerning the provision of food, forage, fuel, light, clothing, and transport: to the Master-General of Ordnance the subjects with which he had previously dealt, together with those of the Inspector-General of Fortifications. The report urged strongly that the members of the Council should not be immersed in the details of administration, and recommended an organization which would give to each member of the Council supervision of a branch of the service, with the corresponding expenditure, but would leave them leisure for the consideration of the general questions of policy which would come before the Council as a whole.

Secretary of State Supreme.

It must be observed that although the Secretary of State is now a member of a Council, just as the First Lord of the Admiralty is a member of a Board, he is, like the First Lord, practically supreme, as must needs be the case where he is responsible to Parliament for all matters concerning the Army. The changes of 1904 are beneficial mainly because they bring together the important advisory officers, military and financial, in one Council, and thus ensure that there should be a common policy for the whole of our military system, and that this policy should be worked out by discussion among a body of men who are under a common responsibility for advice given to the Secretary of State, himself a party to these discussions.

The political head of these departments is and must be supreme. This has long been established at the Admiralty,

[1] The Letters Patent creating the Council and the Order in Council which provides for the distribution of business are to be found in the War Office list for 1908.

and follows naturally from the Parliamentary responsibility which rests upon the Secretary of State. The man who can say 'this is the policy, military or financial, which the Cabinet have adopted, and which alone I am prepared to propound and to defend in Parliament' is necessarily the master of the situation. Great weight may be attached to the advice of the military or naval experts who are placed on the Army Council or the Admiralty Board, but the decision of policy cannot rest with them.

(c) *The Secretary of State and Parliament.*

The mode in which the system works may now be considered, and the relations of the Secretary of State to Parliament and to the army.

Responsibility to Parliament,

His relations to Parliament are these. First he must every year ask Parliament to legalize the standing army and the rules necessary for its discipline, and to vote the money required for its efficiency in all branches of the service. And next he must answer to Parliament when called upon to do so for the exercise by the Crown of its prerogative in respect of the army.

as to finance;

Aided by the Financial Secretary he considers the demands framed by the military heads of the departments represented on the Council, and must endeavour to reconcile the requirements of the army for money with the requirements of the Treasury for economy. The presence of the military members at discussions on these questions of supply for which the whole of the Army Council are responsible, will tend to prevent that sharp antagonism which formerly existed between the representatives of the service and the ministers responsible to Parliament for the cost of the army. But in the end the estimates for the various branches of the service must depend upon the decision of the Cabinet, which, in forming its decision, is sure to keep in view the probable wishes of its majority in the House of Commons and in the country. The Treasury loves economy for its own sake; the Cabinet likes economy because economy is popular, but it is collectively responsible, with the Secretary of State, for the condition of the

army, and therewith for the security of the Empire. In the end perhaps the House thinks that the estimates are extravagant, while the army thinks they are insufficient. But there can be no doubt that the House is more ready to grant the sums demanded when the demand is made by a civilian, after passing the criticism of the Treasury and the Cabinet, than it would be if the demand were made by a military expert, who might be supposed to think no money ill spent which was spent on his department. as to supply of arms and stores;

It may seem a weak point in the system that no publicity is given to the original demands made by the military heads of departments, nor to the ground of their reduction in the Army Council or by the Cabinet[1]. The estimates usually represent a compromise: not what the military authorities think it right to spend, but only how they propose to spend the sum which the Cabinet venture to demand. Perhaps if the original demand and the ground of reduction were made known both demand and reduction would be made under a greater sense of responsibility[2]. Yet it would be contrary to constitutional practice for the House of Commons to increase the vote beyond the sum asked for by the Ministers of the Crown.

The Secretary of State is responsible for the exercise of the royal prerogative, and everything that is done in the army is done subject to his approval. For the use of these powers he is responsible to Parliament. He must answer to Parliament for the discipline of the troops and for their relations with the citizen as well as for their distribution, efficiency, and cost. The House of Commons may express its disapproval of a Minister directly by censure, or indirectly by refusing him a vote on a question which he thinks important in the business of his office: but while he holds office he is responsible for the exercise of the King's prerogative in respect of the army, and is bound to take care that the prerogative is exercised by the Crown and not by Parliament. No one would desire to see the army the servant of a majority of the House of Commons, nor is it as to military policy;

[1] This was suggested in the report of the Ordnance Inquiry Commission, p. xiv. [2] 1887 [C. 5062].

possible to conceive that the management of any minister, however incapable, would be so bad as the management of an indeterminate number of irresponsible politicians.

as to appointments and dismissals.

Especially is the Secretary of State bound to maintain the discretionary prerogative of the Crown in the appointment and dismissal of officers, their promotion or reward, or the acceptance of their resignation. This prerogative was exercised through the Commander-in-Chief, on the responsibility of the Secretary of State: and it was regarded as important that power of this sort should be in the hands of a non-political officer such as the Commander-in-Chief, because our army, unlike the armies of other European countries, is not divorced from the political rights of citizenship. The soldier, if duly qualified, may exercise the franchise: members of the military profession may sit in the House of Commons. Plainly, then, the King or a Minister of the Crown might use, or be pressed to use, the powers of appointment, promotion, or dismissal for political and party ends. The history of the eighteenth century attests the reality of this danger. The office of Commander-in-Chief, as constituted in 1793, was intended to meet it[1]. At the present time qualifications for appointment are ascertainable in the first instance by the conditions of military education, and beyond this, the readiness with which public opinion can be concentrated on any supposed misuse of patronage affords a fairly sufficient safeguard.

(d) *The Secretary of State and the army.*

In his relation to the army we must note here the change which has been effected by the creation of the Army Council. Until that change was effected there was a marked difference in the positions of the First Lord of the Admiralty and the Secretary of State for War. The First Lord was the first and chief of a Board, which collectively represents the Lord High Admiral and is at the head of the naval profession: while the Secretary of State for War had no such position in respect of the army. The Commander-in-Chief

[1] See debates in 27 Parl. Hist. 1310–18; 30 Parl. Hist. 170–4.

was at the head of the military profession. He had access to the Sovereign: he was for a long time independent of the civil departments, although since 1870 he was required to act in subordination to the political ruler of the army. The Admiralty Board was thus more closely connected with the service which it controls than was the War Office.

His relation to the profession.

Nor was there the same security that the Secretary of State for War should be furnished with the best professional opinion on military matters. Until the Order in Council of 1895 there was no military man responsible for advising the civilian Minister except the Commander-in-Chief. The Secretary of State is now the presiding and responsible member of a Council on which civil and military members alike are bound to advise him to the best of their power, and share with him, though in a minor degree, the responsibility for the efficiency of our army. No professional head of the army any longer rivals the position of the Secretary of State.

His opportunities for information.

§ 4. *The Admiralty.*

I was able to deal more fully with the Admiralty than with the War Office in speaking of the departments of government, because the Admiralty stands by itself, whereas the Secretary of State for War is only one of the group of His Majesty's Principal Secretaries of State. And besides this, the War Office of to-day represents several distinct departments, and its history has been complicated by constitutional questions from which the history of the Admiralty is free. So I need only touch here upon the practical working of the department as contrasted with that of the War Office.

The Admiralty, like the Army Council, is constituted by letters patent as a Board consisting of five Commissioners, of whom all or any two are equally capable of discharging the functions of the High Admiral of the United Kingdom and the territories thereto belonging, and of the Colonies and other dominions of the Crown. On these Commissioners is cast the duty of building, arming, and victualling the fleet, of giving all orders, conferring all offices and appoint-

Duties of Board.

ments, of superintending arsenals, dockyards, and naval hospitals, and making all necessary contracts in respect of the navy. But the constitution of the Board by its Patent does not correspond with its actual working. Orders in Council have added to the Board two Secretaries, one Parliamentary and one Permanent, who are not in the Patent. And the practice of the Board as regards the relative position of its members was confirmed by Order in Council of 1872, which made the First Lord responsible to the Crown and to Parliament for all business of the Admiralty.

Its composition.

The Board consists of the following persons as settled by Order in Council of August 10, 1904[1]:—

The First Lord: four Sea Lords, the third of whom is also 'Controller of the Navy,' and 'responsible to the First Lord for so much as relates to the *material* of the navy': and a Civil Lord. The Parliamentary and the Permanent Secretaries have important administrative duties, but are not members of the Board.

'The Department possesses more the character of a Council with a supreme and responsible head than that of an administrative Board.' The members of this Council are declared by Order in Council of August 10, 1904[2], to be responsible to the First Lord for the business assigned to them by him.

Responsibility of members.

The ultimate responsibility for the efficiency of the navy rests with the Parliamentary chief, and ultimately with Parliament. But as lately as 1890 it seems to have been held that the First Lord should ask the Naval Lords for advice, and must not expect to receive it unasked, and that each Lord is responsible only for the business of his department[3]. The Order in Council above quoted must be taken to enforce individual and joint responsibility upon the entire Board.

But since the working of the department has been

[1] 1905 [Cd. 2416], and see vol. ii, part 1, p. 190.

[2] 1905 [Cd. 2417].

[3] Report on civil and professional administration of Naval and Military Departments, 1890, p. ix, and App. i. pp. 8, 9 [C. 5979].

described earlier, I need not repeat what is stated in Chapter iii, Sect. v, § 3.

The Board meets once a week, or oftener if need be, for two purposes: to give formal assent to matters which should come before the whole Board; and to consult upon and determine questions of general policy, such as the shipbuilding programme of the year.

Comparison of Admiralty and War Office.

The object of the Army Reformers of 1904 was to assimilate the positions of the First Lord of the Admiralty and the Secretary of State for War. Each has now a Board of competent advisers meeting weekly, or as often as he may choose to summon them, and responsible for advising him to the best of their power in respect to the business assigned to them.

In other respects the position of the two Ministers is much the same; each is generally a civilian, each is a Cabinet Minister and Member of Parliament, each has to deal at the same time with the general affairs of State and with the special business of a vast and complex department. The duties of the First Lord may in some respects be regarded as the more onerous of the two, for the changes in scientific opinion, as regards the building, arming, and capacity of ships, and the construction of submarine engines of destruction, involve questions of policy and of expenditure from which the War Office is relieved.

On the other hand the Secretary of State for War has to provide, by the process of voluntary enlistment, a regular army and a reserve, which may act as a striking force wherever needed throughout the Empire, and a territorial force for the defence of our shores; and this force must be equipped with all modern appliances for attack and defence.

To discharge the responsibilities of either office the civilian chief needs not merely the faculty for administration, but the instinct to choose and the vigour to act upon the best opinion offered to him: and expert opinions often conflict. These Boards and Councils can but express opinions: and although the terms of the Patents constituting the Admiralty Board and the Army Council may seem to place the

members of those bodies on an equal footing, power must needs reside in the man who is to his colleagues the spokesman of the Cabinet, and for whose action the Cabinet are responsible to Parliament.

While the Ordnance Board existed it supplied both departments alike with war material. When it ceased to exist as a separate department, the War Office, in which it was merged, continued to design and make guns for the navy, and the stores of the two departments were kept together. The joint custody of stores was abandoned in 1891, but care is taken that the ordnance of army and navy should be interchangeable.

§ 5. *The Imperial Defence Committee.*

A more important point of contact between the two services is to be found in the Committee for Imperial Defence. This Committee took its origin from a recommendation of the Hartington Commission [1]. Suggestions had been made to the Commissioners for a combination in one form or another of the two departments with a view to improved preparation for political contingencies and for joint action in time of war. One of these proposals contemplated the creation of a Minister of Defence, who should be the supreme and responsible head of both services; another would have left the control of each department to professional men, with a civilian Minister whose business should be mainly concerned with the expenditure and the accounts of the two services, but who might also be a medium of communication between the two. Both these proposals were open to the objection that neither service would be directly represented in the Cabinet by a Minister responsible for its requirements and its interests: while the second would have placed responsibility for military and naval efficiency in the hands of men who would not be present in the Cabinet, or in Parliament, leaving financial responsibility alone to

[1] Report on civil and professional administration of Naval and Military Departments 1890 [C. 5979], p. viii.

the Minister. This would have made a formidable inroad on the theory and the practice that there should be some one directly responsible to Parliament for the administration of every important branch of the public service. In the end the Commission recommended 'the formation of a Naval and Military Council, which should probably be presided over by the Prime Minister, and consist of the Parliamentary heads of the two services, and their principal professional advisers.' The main purpose of this Committee would be to consider the Estimates, so that the two services might compare notes, and determine the relative importance of their respective demands, and also to deal with 'any unsettled questions between the two departments, and any matters of joint naval and military policy which in the opinion of the heads of the two services required discussion and decision.'

A Committee of this character was formed, and so far differed from other Committees of the Cabinet, that its proceedings were recorded, and the record passed on from one administration to another.

But the importance of such a Committee and its possible usefulness became more obvious as time went on, and more especially during the South African war. We find that a change comes over it in 1902, as described in evidence given before the Commission which inquired into the conduct of the war [1].

From the time that Mr. Balfour succeeded Lord Salisbury, the Prime Minister regularly presided at the meetings of the Committee. The Secretary of State for War, the First Lord of the Admiralty, the head of the Army General Staff, the First Sea Lord, and the heads of the Army and Navy Intelligence departments were always present. Representatives of other departments, the Chancellor of the Exchequer, the Foreign, Colonial, or Indian Secretaries, or representatives of the self-governing colonies may be summoned if their advice is needed.

The Estimates no longer formed the principal or primary subject of discussion. The needs of Imperial defence came

[1] [Cd. 1791], p. 550. Evidence of Mr. Brodrick.

first, and the decision of the Committee on these points guided the departments in the character and the cost of their preparations.

A further change was the result of the recommendations of the War Office Reconstitution Committee. A permanent Secretary was appointed to keep the records of the Defence Committee, and this last change gives a stability to the Committee and its work which was lacking while it retained anything of the character of a Cabinet Committee.

It remains then to note some features of this Committee. It is primarily concerned with questions of Imperial Defence, and secondarily with the estimates for the expenditure of the Army and Navy.

The nucleus of the Committee consists of the Prime Minister and the heads, political and professional, of the War Office and Admiralty, but representatives of departments which may be interested, or experts whose advice may be required, can always be summoned to attend.

Its discussions are confidential and secret, and its functions are purely advisory, but it differs from a Committee of the Cabinet in two important features. It possesses a small permanent Secretarial Staff for the record of its proceedings, and that record is preserved and handed on from one administration to another for the information of those concerned.

CHAPTER IX

THE CROWN AND THE CHURCHES

SECTION I

INTRODUCTORY

§ 1. *The State and Religious Societies.*

THE relations of the Established Church to the Crown in Council and to the Crown in Parliament are very apt to be misunderstood, and it may be well to consider the relations which must subsist between any and every religious society and the Crown.

A religious society exists, one must suppose, for the purpose of maintaining and enforcing definite articles of faith and of doctrine, rules of conduct corresponding to its belief, and forms of worship designed to influence faith and conduct. But such a society is in necessary subordination to Parliament, because Parliament may make the profession of its opinions unlawful, may subject the performance of its acts of worship to a penalty, may impose tests which disqualify its members for office or franchise. Parliament in its omnipotence may do what it will with any religious society; it may pass righteous laws forbidding the public expression of opinions which are shocking or painful to the majority of citizens, or the public use of forms or rituals which disturb or demoralize them; or it may pass unrighteous laws interfering with freedom of religious opinion, or of worship, or with the free action of voluntary societies.

A religious society.

Its subordination to Parliament,

And again, every religious society, large or small, which enters into relations of property or contract, must necessarily be liable to have its doctrines discussed in a court of

and to the Courts of Law.

law. If two persons engage a third to preach a certain doctrine to them for a sum named, and refuse to pay him on the ground that his teaching has not conformed to the opinions which they engaged him to enforce, a court of law can duly settle the matter between the disputants by comparing the doctrine which the preacher undertook to teach with the doctrines which he taught.

§ 2. *Establishment.*

An Established Church.

But the Established Church has a closer connexion with the State than this necessary subordination to Parliament and liability to have its doctrine discussed and interpreted in courts of law. The King is Head of the Church, not for the purpose of discharging any spiritual function, but because the Church is the National Church, and as such is built into the fabric of the State. The Crown itself is held on condition that the holder should be in communion with the Church of England as by law established. The

Its relation to the Crown;

Convocation of the Church is summoned, prorogued, and dissolved by the Crown, it cannot enter on ecclesiastical legislation without royal permission, nor make canons without the royal licence and assent.

The Crown appoints the great officers of the Church, and of these the Bishops are not only administrators and judges of ecclesiastical law, but constitute the Lords Spiritual in the House of Lords.

to the Courts;

The courts of the Church are not private tribunals for determining the internal differences of a voluntary society: the law of the Church is a part of the law of the land, and the King is over all persons in all causes, as well ecclesiastical as temporal, within his dominions supreme.

to Parliament.

For not only is the Church unable to make new canons without the royal assent, but its liturgy and articles of religion have a Parliamentary sanction: though not made by Parliament, they have been accepted by Parliament, and therefore they need the combined action of Church and State for their alteration.

A brief historical note is necessary in order to understand how these relations have come about.

§ 3. *The National Church before the Constitutional Reformation.*

The conversion of England was effected piecemeal, partly from Ireland, partly from Rome during the seventh century. The Roman influence prevailed, and the English Church became a national church in communion with the Church of Rome, recognizing under a gradual process of encroachment a metropolitan jurisdiction in the Pope of Rome, until it threw off his jurisdiction in the reign of Henry VIII, and ceased to be in communion with the Roman Church. The Conversion.

The character of its relations with Rome was substantially fixed by William the Conqueror, and the rules which he laid down were broken, revised, re-enacted, and broken again till they were firmly embodied in the legislation of Henry VIII.

In Saxon times the Church was the nation in its religious aspect; for the Church had been an institution common to the whole country, and had brought about religious unity some time before an unstable political unity had been achieved by the Kings of Wessex. Kings and ealdormen attended the ecclesiastical councils of the heptarchic kingdoms; the Bishops were members of the witan: ecclesiastical legislation was frequently confirmed in the witan or gemot. In the tenth and eleventh centuries these ecclesiastical councils became unfrequent[1], and ecclesiastical regulations were largely made in the lay assemblies. The Saxon Church.

As the distinction between the ecclesiastical and civil power is obscure in the region of legislation, so it is in that of jurisdiction. The Bishop sat with the sheriff and ealdorman in the shiremoot to declare the law spiritual. How far the Bishops had domestic tribunals to deal with purely spiritual offences among the clergy, seems uncertain[2].

The Conqueror forbade Bishops and Archdeacons to hold spiritual pleas in the court of the hundred, and required them to have courts of their own, to decide cases not by The Norman changes.

[1] Stubbs, Const. Hist. i. 230-42.

[2] Ibid. 233.

customary but by canon law, and to allow no laymen to adjudicate on spiritual questions. The King and sheriff would carry out the sentence [1]. This great change made the Church a distinct body within the State. The law for the clergy was not the law for the laity, nor was it administered in the same courts. Canon law was growing, here and elsewhere, into a mass of arranged and digested rules. It included not merely regulations for the clerical life and order, and a system of penitential discipline applicable to the laity, but the law applicable to matrimonial and testamentary causes. A rivalry at once grew up between secular and spiritual courts, the latter endeavouring to oust the jurisdiction of the former in respect of persons and encroach on their business in respect of causes.

The Church judiciary,

and legislative.

More important still was the question of the independent legislative power of ecclesiastical assemblies to make canons enforceable in the ecclesiastical courts, and the question of the right of a suitor, if dissatisfied with the decision of these courts, to carry an appeal to Rome. William met dangers which these last questions suggested by making and enforcing certain rules.

The rules of the Conqueror.

(*a*) No one in his dominions might receive the pontiff of Rome as apostolic pope except at his command, or receive papal letters unless first shown to himself.

(*b*) Nothing was to be enacted or forbidden by the Archbishop in an assembly of Bishops except what was agreeable to him and had first been enjoined by him [2].

The first of these rules strikes at the unauthorized recognition of the Pope as a final court of appeal, the second at the independent legislative action of the Church. A third usage, claimed as a settled rule by Henry I, made it unlawful for legatine power to be exercised or for a legate to land in England without a royal licence [3].

The claims of the clergy:

These early constitutional relations of Church and State help to elucidate the controversies of later times.

immunity from secular courts;

The clergy claimed immunity from secular jurisdiction; it was one object of the Constitutions of Clarendon, an

[1] Stubbs, Charters, p. 85. [2] Stubbs, Const. Hist. i. 285.
[3] Ibid. i. 286.

object not wholly attained, to make them equal with laymen before the law.

enforcement of spiritual penalties;

The Church courts enforced spiritual penalties with the aid of the secular power, and the abuses of this jurisdiction, under which penance was commutable for a money payment, were matter of grave complaint in the later days of the unreformed Church.

appeals to Rome;

Appeals were carried to Rome despite the rules of William I and the Constitutions of Clarendon, but the corruption of the Roman Court seems to have enabled the appellate jurisdiction of the Archbishop to compete successfully with that of Rome.

Thus much for jurisdiction. The ecclesiastical assemblies had undergone a change, due to the practice which began to prevail from the end of the twelfth century of taxing separately the estate of the clergy. To settle the sums which should be granted, representative assemblies of the clergy of each province were summoned, but by no mandate from the Crown[1]. Representation for taxing purposes led to representation for purposes of general discussion: the refusal of the clergy to attend Parliament when summoned, and their insistence on their right to determine their contributions in their own assembly, brought about two results. The lower clergy acquired a permanent place in their convocations: and the King found it to be for his interest that the provincial assemblies should meet with frequency.

legislative independence of Convocation.

Thus the estate of the clergy kept apart: divided in the convocation of each province into two houses, an upper and a lower; meeting without the royal summons; enacting canons without the royal assent; claiming to be exempt in some respects from the secular tribunals; looking to Rome for an ultimate court of appeal.

[1] Stubbs, Const. Hist. ii. 175.

Section II

The Reformation Settlement

§ 1. *The aspects of the Reformation.*

The changes,

The Reformation is a general term for three distinct forms of change which affected the Church of England in the sixteenth century – doctrinal, social, constitutional.

doctrinal,

With the doctrinal change we are but indirectly concerned. The Church of England ceased to be in communion with the Church of Rome, recast its Liturgy, and determined various points of controversy in the Articles of Religion. With the substance of the change we have nothing to do; with the effect given to the change by enactments in Parliament we must presently deal.

social,

The social change brought about by the dissolution of the monasteries and the permission accorded to the clergy to marry [1] may be passed over.

constitutional.

The constitutional change is of importance here.

Henry VIII was declared to be the 'only Supreme Head on earth of the Church of England [2].' The Act which conferred this title was repealed by Mary, and was not revived by Elizabeth. But her Act of Supremacy [3] asserted, and required all holders of office, lay and clerical, to acknowledge by oath that the Queen was sovereign over all persons and causes ecclesiastical and temporal, to the exclusion of any and every foreign power. The terms 'Supreme Head' and 'Supremacy' do not here profess to attribute spiritual powers to the Crown; they assert, as against the alleged Supremacy of the pope, that the King was, for all constitutional purposes, the head of a National Church.

The royal supremacy.

We can recognize the sense in which the Church was thus built into the fabric of the State by an examination of the other Statutes which worked out the constitutional change, and of their effects.

For though the Act which declared the King to be Head of the Church was repealed, the sense in which such Headship was recognized may be collected not only from the

[1] 2 & 3 Ed. VI, c. 21. [2] 26 Hen. VIII, c. 1. [3] 1 Eliz. c. 1.

Act of Supremacy but from those other Acts by which the constitutional change was worked out. They fall under three heads—

(1) The recognition of the ultimate judicial power of the Crown;

(2) the recognition of the legislative subordination of the estate of the clergy;

(3) the sanction given by Parliament to the Liturgy and Articles of Religion as formulated by Convocation.

§ 2. *The judicial power of the Crown.*

Appeals to Rome forbidden.

The Act for restraint of Appeals to Rome was passed in 1533. It recites the capacity of the body spiritual to determine doubtful matters for itself: it further recites the statutes of former reigns against the intrusions of the see of Rome, and the inconvenience of appeals to Rome on the grounds of trouble, expense, and the difficulty of obtaining evidence. It then proceeds to enact that causes relating to testaments, matrimony and divorce, tithes, oblations and obventions, should be finally determined within the King's jurisdiction; that no citations, inhibitions, or interdicts should interfere with the rights of spiritual persons within the realm to administer the sacraments and services of the Church; and that the taking of appeals to Rome, or the introduction of any form of process from Rome, should be visited with the penalties of a *Praemunire*.

An appellate jurisdiction provided at home:

Then the Act provides for Appeals. Cases which begin in the court of the Archdeacon or his official may be taken thence on appeal to the Bishop or his commissary, and thence to the court of the Archbishop of the province. Cases which begin in the court of the Archdeacon in an archiepiscopal see are to go thence to the Archbishop's Court of Arches or Audience, and thence to the Archbishop. The decision of the Archbishop was to be final in all cases save where the King was concerned; in these an appeal was given to Convocation.

to Crown in Chancery;

This Act was amended by the Act for the Submission of the Clergy[1], which provided a remedy for lack of justice

[1] 25 Hen. VIII, c. 19.

in any of the courts of the Archbishops, enacting that an appeal should lie to the King in Chancery, and that he should on every such appeal appoint a commission under the Great Seal to such persons as he should name to 'hear and definitely determine such appeal and the causes concerning the same.'

The Court of Delegates, thus constituted, heard appeals and gave judgment, without assigning reasons, if a majority concurred: if not, 'a commission of adjuncts' was issued increasing the numbers of the Court [1].

now to Crown in Council.

Parliament, in 1832 [2], took the dealing with ecclesiastical appeals from the Crown in Chancery and assigned it to the Crown in Council; giving power to the Crown to make orders as to the hearing of such appeals.

The Judicial Committee.

In 1833 [3] was constituted the Judicial Committee of the Privy Council, a court which hears ecclesiastical and other appeals, and reports, as a Committee of the Council, to the Crown in Council for decision. Of this Court of Appeal I shall have occasion to speak later on.

Of the ecclesiastical courts I will also speak later; here it is enough to note that the law of the Church is a part of the law of the land; that the Crown nominates and to all intents and purposes appoints the Bishops and Archbishops who administer this law in person or through their representatives; and that from their decisions an appeal lies to the Crown in Council.

§ 3. *The Submission of the Clergy, and the procedure of Convocation.*

Effect of submission of clergy.

The Submission of the Clergy [4] was an acknowledgement by the Convocations of the clergy that they could be summoned only by the King's writ, that they could enact no canons without the King's licence, and that such as were enacted could have no force without the royal assent, nor bind the laity without the royal assent in Parliament.

[1] Lord Selborne, Judicial Procedure of the Privy Council, p. 34.
[2] 2 & 3 Will. IV, c. 92.
[3] 3 & 4 Will. IV, c. 41.
[4] 25 Hen. VIII, c. 19.

The Submission was embodied in a Statute[1], which also provided for a Commission, to be appointed by the King, to revise the canon law. Meantime such canons as were in force in the Church, and were not at variance with the law, were provisionally affirmed.

The summons of Convocation.

The Act affects (1) the rights of the Convocations to meet, and (2) their legislative power when assembled; so I will first deal with the procedure by which Convocations are summoned, prorogued, and dissolved[2], and then with their legislative powers.

The summons, prorogation, and dissolution of the two Houses of Convocation take place simultaneously with the summons, prorogation, and dissolution of Parliament, and the procedure is as follows.

First, an Order in Council is made for the issue of writs to the Archbishops of the two provinces, and then there follows the writ of summons addressed to each Archbishop. The following illustrations will serve to show the nature of the procedure:—

Order in Council.

At the Court at ——, 26 June, 1886.

Present, the Queen's most excellent Majesty in Council.

Order in Council for writ.

It is this day ordered by Her Majesty by and with the advice of her Privy Council that the Right Honourable The Lord High Chancellor of that part of her United Kingdom, called Great Britain, do, upon notice of this Her Majesty's order, forthwith cause writs to be issued in due form of law for electing new members of the Convocation of the clergy, which writs are to be returnable on Friday the 6th day of August, 1886.

Writ of Summons.

Writ of summons to Archbishop.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the Most Reverend Father in God, our right trusty and well beloved Councillor, ——, by the same Grace Archbishop of Canterbury, Primate of all England, and Metropolitan, Greeting; by reason of certain difficult and urgent affairs concerning

[1] 25 Hen. VIII, c. 19.

[2] See for all these forms Pearce, Law relating to Convocations of the Clergy.

Us, the security and defence of the Church of England, and the peace and tranquillity, public good, and defence of our kingdom and our subjects of the same, We command you, entreating you by the faith and love which you owe to Us, that, having in due manner considered and weighed the premises, you call together with all convenient speed in lawful manner all and singular the Bishops of your Province, and Deans of your Cathedral Churches; and also the Archdeacons, Chapters and Colleges, and the whole Clergy of every Diocese of the same Province, to appear before you in the Cathedral Church of Saint Paul, London, on Wednesday, the twenty-second day of September next ensuing, or elsewhere, as it shall seem most expedient, to treat of, agree to, and conclude upon the premises and other things which of them shall then at the same place be more clearly explained on our behalf. And this as you love Us, the state of our kingdom, and honour and good of our aforesaid Church, by no means omit. Witness ourselves at Westminster, the —— day of ——, in the —— year of our reign.

Mandate to Dean of Province.

In obedience to this writ the Archbishop of Canterbury issues a mandate to the Dean of the Province, the Bishop of London, reciting the writ and requiring that he—

Citation of Bishops.

peremptorily cite all and singular Bishops Suffragans of our Cathedral Church of Christ Canterbury, constituted within the province of Canterbury, and wills that by them you peremptorily cite and monish the Deans of the Cathedral and Collegiate Churches and their several Chapters, and the Archdeacons and other dignitaries of churches exempt and not exempt personally, and each Chapter of the Cathedral and Collegiate Church by one, and the clergy of every Diocese within our province by two sufficient proctors to appear before us on the day named.

The mandate threatens canonical punishment for contumacious non-attendance, and requires a return, from the individual Bishops, of the persons cited by them, and from the Dean of the Province, of his obedience to the mandate.

In the Province of York the Archbishop addresses himself directly to his suffragans and clergy.

Of Deans, Archdeacons, Proctors.

The Bishops issue mandates to the Deans in their dioceses to attend in person and to procure the election of a proctor by the chapter, and to the Archdeacons to attend in person

and to summon the clergy, who in the Province of Canterbury are represented by two proctors for each diocese, in the Province of York by two proctors for each archdeaconry.

Citations are issued by the Deans and Archdeacons in pursuance of these mandates, returns are made to the mandates and citations, and thus Convocation is finally assembled.

The Convocations are prorogued or dissolved by writs issued under the Great Seal.

It will be noticed that the parochial clergy are more largely represented in the Province of York than in that of Canterbury.

Legislative Powers and Procedure.

The two Houses.

In each Convocation the Bishops form the Upper House: the Deans, Archdeacons, the proctor representing each chapter, the two proctors for each diocese as in Canterbury, or for each archdeaconry as in York, form the Lower House.

The Archbishop of the province presides in the Upper House: the Lower House chooses a Prolocutor.

Legislative powers.

The legislative powers of Convocation are confined to the making, repealing or altering of canons: and the effect of these canons, unless Parliament affirm them, is to bind the clergy only[1]. When it is desired that the expressed wishes of Convocation should become a part of the general law of the land, binding alike on laity and clergy, two methods are possible.

Synodical resolutions adopted by Parliament.

(1) The two Houses of Convocation meeting in Synod may pass resolutions which are subsequently adopted and embodied in a Statute by Parliament. This has been done in respect of the Book of Common Prayer, as regards its present form, when settled in 1662[2], and as regards the shortened forms of service permissible since 1872[3].

[1] See *per* Lord Hardwicke, *Middleton and Wife* v. *Croft*, Strange 1056.

[2] The Act of Uniformity of 1559 revived the Prayer-book which had first been settled by Convocation and then affirmed by Parliament in 1552. Although this Act of 1559 was not immediately preceded by a vote of Convocation, it was in substance a revival of the Parliamentary sanction of 1552 which had been revoked, without any reference to Convocation, by an Act of the first year of Mary's reign.

[3] Chronicle of Convocation for 1872, p. 299; and 35 & 36 Vict. c. 35.

Canonical legislation: (a) affirmed by Parliament;

(2) Convocation may pass canons which are subsequently affirmed by Parliament. The only illustration which I can offer for this statement is the provisional affirmation of existing canons in the Act for the Submission of the Clergy. Such affirmation may necessitate from time to time an inquiry by a court of law into the canons or constitutions accepted and in force before the Reformation. Thus in the case of *Escott* v. *Mastin*[1], the validity of baptism by a layman was called in question, and its efficacy was maintained on the authority of the general practice of the Western Church since the fourth century, and, in particular, of the constitutions of Archbishop Peckham in 1281.

(b) binding only on clergy.

But Convocation may pass canons, which, whether or no they are enforced by Parliament upon the laity, are binding upon the clergy, and the process by which this power is conferred should be followed.

Process of legislation.

Letters business.

The first stage is the communication by the Crown to Convocation of *Letters of Business*. These may be granted on the petition of Convocation or spontaneously by the Crown. They amount to an expression of willingness on the part of the Crown that Convocation should discuss the matter described in the letters, either generally, with a view to concurrence in Parliamentary legislation, or specially with a view to the alteration of a canon.

Licence to make canon.

These letters of business, when issued with a view to canonical legislation, are accompanied by a Licence in the form of letters patent, giving power to make or alter the canon in question. The licence sets forth (1) the Act for the Submission of the Clergy, (2) the permission which is accorded for the proposed change, (3) a provision that the new canon shall not be contrary to the doctrine, orders or ceremonies of the Church, (4) a provision that the new or altered canon shall not be valid until allowed and confirmed by further letters patent.

An illustration of the process is afforded by the proceedings in Convocation in 1887.

Illustration.

The 62nd canon of 1603–4 forbade the celebration of marriage save between the hours of 8 a.m. and midday:

[1] 4 Moore, P. C. 104.

this rule possessed a merely ecclesiastical sanction, and was not supported by any secular penalty, until an Act of 1823[1] imposed heavy penalties on the celebration of marriage at any other time than that specified in the 62nd canon. In 1886 the legislature extended this time, legalizing the celebration of marriage between the hours of 8 a.m. and 3 p.m.[2]

In 1887 the Convocations of the two provinces desired to alter the 62nd canon so as to correspond with the Act of 1886. On February 10 the President of the Province of Canterbury stated that he had received from the Crown Letters of Business, with a Licence authorizing the Convocation to amend the 62nd and 102nd canons[3], and to submit the alterations to be confirmed, if approved, by Her Majesty. The proposed amendments were then discussed in both Houses in the Convocations of both provinces, and when finally settled were transmitted through the Home Secretary to the Queen.

Licence to promulge.

The royal assent was then signified by a permission to promulgate the new canons given by Licence under the Great Seal in the following form:—

Victoria by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To all to whom these presents shall come, Greeting. Whereas, in pursuance of the writing under our Royal sign manual, dated the 9th day of September the fiftieth year of our reign, and directed to the Lord Archbishop of Canterbury, President of the Convocation of the Province of Canterbury, the said Archbishop and the rest of the Bishops of the said Province, or a majority of them whereof the said President was one, and the rest of the clergy of the said Convocation have set down in writing and exhibited unto Us, new and amended Canons, being word for word as follows;

(Then follows the canon in Latin and English.)

Now know ye that we, by virtue of our Prerogative Royal and Supreme authority in causes ecclesiastical, do hereby of our

[1] 4 Geo. IV, c. 76, s. 20.

[2] 49 & 50 Vict. c. 14.

[3] The 102nd canon contained a requirement, long obsolete, that marriages should be solemnized during morning service.

especial Grace, give our royal assent to such new and amended canons so exhibited as aforesaid, and we do allow the same and do hereby grant unto the Most Reverend Father in God our right trusty and well-beloved councillor Edward White, Archbishop of Canterbury, President of the Convocation of the Province of Canterbury, and to the rest of the Bishops and clergy therefore our royal licence to make, promulge and execute the said new and amended canons so exhibited as aforesaid, any other cause, matter or thing notwithstanding.

In witness whereof we have caused these our letters to be made Patent. Witness our self at Westminster the 16th day of September in the 51st year of our reign.

By warrant under the Queen's sign manual.

(Clerk of the Crown.)

Form of promulgation.

The promulgation of a canon takes place in the presence of both Houses, the President of the Upper and the Prolocutor of the Lower House each holding a portion of the document while it is read by the President. It is then signed by members of both Houses.

Dispute as to licences required.

Members of Convocation have from time to time contended that the issue of two royal licences, the one to 'make' and the other to 'promulge,' is an infringement of the legislative rights of the Church as defined by the Act for the Submission of the Clergy. They have maintained that the prerogative rights of the Crown are exhausted in the issue of one licence, and that on the receipt of this the Convocation is empowered to legislate as it pleases on the prescribed subject, and to promulgate such legislation with no further royal intervention[1].

But this technical construction of the Act has not found favour with the legal advisers of the Crown. The first licence is always provisional—a licence to make a canon subject to the approval of the Crown—the second licence is an expression of such final approval.

Checks on legislation.

It may happen that the Ministers of the Crown may think that ecclesiastical legislation on the subject suggested

[1] Chronicle of Convocation, 1873, Report of a Committee on Privileges, February 13.

by Convocation is undesirable. In that case no licence is granted. Or it may happen that when such legislation is permitted its form is regarded as open to objection, or the Convocations of the two provinces may be unable to agree as to the canons which they would put forth. The licence to 'promulge' may then be withheld. Such was the case in 1861 and 1865 with regard to an alteration of the 29th canon[1]. The existing practice seems to afford a useful check on hasty or ill-considered ecclesiastical law-making. The laity might be seriously affected by such legislation, and they have no voice in the matter except through the control exercised by the King's Ministers in the manner which I have described.

Sanction of canons.

Canons which bind the clergy only are enforced by various ecclesiastical punishments which I do not propose to discuss here. They may affect the laity in so far as they would justify a minister in refusing to allow a layman to participate in certain rites of the Church.

Canons which bind the laity may be enforced by refusal of the sacraments and by excommunication.

Excommunication.

Excommunication, which once carried with it serious civil penalties and disabilities, has been deprived of these effects by 53 Geo. III, c. 127. As a mode of enforcing the orders and decrees of an ecclesiastical Court it was thenceforth discontinued: but as a spiritual censure for an ecclesiastical offence it may still carry with it a liability to imprisonment for a term not exceeding six months. The excommunicate may also be refused the sacrament, and if he die in contumacy the burial service may not be performed over him.

§ 4. *The Acts of Uniformity; the Prayer-book and Articles of Religion.*

Tests of membership.

The doctrines and the forms of worship distinctive of the Church of England are embodied in the Articles of Religion and the Book of Common Prayer. To maintain doctrine contrary to any of the Articles renders an ecclesi-

[1] Chronicle of Convocation, 1872, p. 710.

astical person liable to be deprived of any place or promotion which he may enjoy, by 13 Eliz. c. 12, s. 2. To use the Book of Common Prayer, the forms therein contained and none other, is enjoined upon all ministers by 1 Eliz. c. 2, and 14 Car. II, c. 4. Every candidate for ordination is required[1] to express his assent to the Articles and Book of Common Prayer, and to take the oath of Allegiance.

Sanctioned by Statute.

The doctrines and form of worship of the Church of England are therefore sanctioned by Statute. Parliament did not frame the doctrine, nor order the worship, but Parliament has approved them, and has in certain cases provided punishment for a departure from them. Thus in order to enable shortened forms of service to be lawfully used at morning and evening prayer, it was necessary to amend the Acts of Uniformity of 1662. This was done, after a report had been received in favour of the proposed alterations from the Convocations of Canterbury and York, by an Act of 1872[2].

Character of an established Church.

Thus the Church of England, like the established Presbyterian Church of Scotland, differs from other religious societies in this respect, that the conditions of membership are endorsed by the Legislature and cannot be altered without legislative enactment. In this sense the law of the Church is th law of the land. It cannot be altered at the pleasure of the members of the Church. Convocation could not, even with the most ample licence from the Crown, alter or repeal any one of the Articles, or vary the rubric settled in the Prayer-book. To do this recourse must be had to the Crown in Parliament.

Section III

Ecclesiastical Places, Persons, and Property

In dealing with ecclesiastical persons, places, and property I propose to confine myself as far as possible to the

[1] 28 & 29 Vict. c. 122, s. 1, and s. 4 amended by 31 & 32 Vict. c. 72, s. 8; the Clerical Subscription Act, and the Promissory Oaths Act.

[2] 35 & 36 Vict. c. 35.

points at which Church matters touch and are affected by the central government: for I am not treating of the law of the Church generally, but of the Church in its relations to the State.

§ 1. *Ecclesiastical places.*

The province.

For purposes of deliberative assembly, legislation, and judicature, the Church of England is divided into two provinces, the northern and the southern—York and Canterbury. The first of these contains ten[1] bishoprics, including the archiepiscopal diocese of York. The second contains twenty-seven bishoprics, including the archiepiscopal diocese of Canterbury and the four Welsh bishoprics.

The diocese.

Next after the province comes the diocese, the area of the Bishop's authority and jurisdiction: the centre of ecclesiastical authority is here the cathedral, where the Dean and Chapter assist the Bishop in the celebration of divine service, and advise him in the spiritual and temporal affairs of the see.

The archdeaconry.

The diocese again is divided into archdeaconries for purposes of administration and judicature, and these again into rural deaneries for purposes purely administrative.

The rural deanery.

The areas of archdeaconries and rural deaneries may be altered and their numbers increased or diminished by schemes made by the Ecclesiastical Commissioners and approved by the Crown in Council[2].

The parish.

The ecclesiastical unit is the parish, which corresponded in the southern parts of the country to the township of Saxon times. The civil functions of the rural parish, the management of non-ecclesiastical parish property and charities, the enforcement of certain permissive Acts, and other local matters, are now transferred to an elected body, the Parish Council[3].

The peculiar.

The *peculiar* should be mentioned here, though it is mainly concerned with jurisdiction. A *peculiar* in the

[1] This number includes the Bishop of Sodor and Man, who has a seat but no vote in the House of Lords.

[2] 6 & 7 Will. IV, c. 77; 3 & 4 Vict. c. 113; 37 & 38 Vict. c. 63.

[3] See chapter v, sect. i. § 5. Rural Local Government.

region of ecclesiastical judicature corresponded with the *liberty* in secular matters. It was a fragment taken for judicial purposes out of its geographical surroundings and assigned to some extraneous ecclesiastical person. There were in 1832 Peculiars to the number of, nearly, 300, belonging some to the Crown, 'some to archbishops, bishops, deans, deans and chapters, archdeacons, prebendaries and canons, even to rectors and vicars'; there were also some 'of so anomalous a character as hardly to admit of description[1].'

For purposes of jurisdiction these peculiars are practically abolished[2].

§ 2. *Ecclesiastical persons.*

Spiritual, In respect of their spiritual capacity, ecclesiastical persons are Bishops, Priests, or Deacons.

administrative. As regards the internal government and discipline of the Church, its officers are Archbishops, Bishops, Deans, with or without chapters, Archdeacons, Rural Deans, Rectors, Vicars, and others who enjoy preferment and are responsible for a cure of souls, differing only from rectors and vicars in the mode of their appointment[3].

The spiritual functions may be dismissed: a Bishop concerns us only in so far as he is a Bishop exercising government and jurisdiction over an episcopal see; a priest only in so far as he holds preferment or differs in status from a layman.

Administrative functions concern us only in so far as they concern central government. Jurisdiction is matter for a chapter on the Courts.

An Archbishop. The spiritual capacity of an Archbishop does not differ from that of a Bishop, but the Bishop owes obedience to the Archbishop of his province, and has been regarded by

[1] Ecclesiastical Courts Commission, 1830-2, cited in the Report of the Ecclesiastical Courts Commission, 1883, p. 198.

[2] See 10 & 11 Vict. c. 98, and the continuing Acts, and 3 & 4 Vict. c. 86, s. 22.

[3] Such are the perpetual curate, the minister of a chapel of ease, the donee; see Phillimore, Eccl. Law, vol. i, ch. x, pp. 239-59 (ed. 2).

the Privy Council, and treated by the Archbishop, as subject to his jurisdiction[1].

The Archbishop of Canterbury.

Elsewhere I have dealt with the forms of appointment, election, confirmation, and consecration. Of the two Archbishops, the Archbishop of Canterbury takes precedence. He is Primate and Metropolitan of all England. He has the privilege of crowning the King, or the Queen regnant. It would appear that he also crowns a Queen Consort. This right has been claimed by the Archbishop of York, but at the Coronation of King Edward VII it was held by the Court of Claims that the crowning of Queen Alexandra, if accorded to the Archbishop of York, was accorded as a matter of grace[2]. The authority of the Archbishop of Canterbury for granting faculties and dispensations extends to both provinces[3].

The topic of jurisdiction, other than visitatorial, must fall into a chapter on the Courts.

The visitatorial jurisdiction, whether of an Archbishop or a Bishop, seems to amount to a right to hold inquiry with a view to making orders and decrees, and with a further object of taking proceedings based on the result of such inquiries. It does not extend to trial and sentence for offences against ecclesiastical law[4].

A Bishop.

In virtue of his spiritual qualifications the Bishop exercises powers which create legal rights and liabilities. He ordains; he thus qualifies the person ordained to hold ecclesiastical preferment, and brings him within the scope of ecclesiastical law. He consecrates; he thus gives to a building the character of a church. He confirms; the confirmed person is thus entitled to partake in the Sacrament of the Lord's Supper. He has administrative duties consequent on the exercise of these powers. He takes a necessary part not only in ordination but in the *institution* of an ordained

[1] L. R. 13 P. D. 221, and see Report of the Proceedings in the Court of the Archbishop of Canterbury, in the Bishop of Lincoln's Case, by E. Roscoe, and 14 P. D. 88.

[2] 'It was not a question of right; the matter was one for the decision of His Majesty, and was a matter of grace and not of right.'—Times newspaper for Jan. 15, 1902, p. 4. Report of a sitting of the Court of Claims.

[3] 25 Hen. VIII, c. 21, s. 3. [4] *Dean of York's* case, (1841) 2 Q. B. 1.

person to a rectory or vicarage to which he has been presented, and he has a discretionary power, upon sufficient cause, to refuse to institute [1]. He visits his diocese once in every three years, and can inquire into the conduct of the persons and the condition of the fabrics within the range of his jurisdiction. The sanction for such orders as he may make is to be found in the judicial powers of the Bishops, to be dealt with hereafter. A suffragan, or assistant, Bishop is appointed in the manner, and enjoys the powers, described on page 249. I have described elsewhere the mode in which a Bishop is chosen, confirmed and consecrated [2].

A Dean.

A *Dean* [3] is appointed by letters patent under the Great Seal: so too are the Canons who constitute the Chapter, except where the right of appointment to a canonry is vested in the Bishop. In theory the Dean and Chapter are a council of advisers to the Bishop: in fact, they are responsible for the service of the cathedral, they take a formal part in the election of a bishop, but the actual duties of members of the Chapter do not correspond with the original conception of its purpose.

The Archdeacon.

An Archdeacon is appointed by the Bishop of the diocese. Although, unlike the Dean, he is not appointed by the Crown, he is more closely connected with the central government, in so far as he possesses judicial functions; he has a court and a jurisdiction subordinate to that of the Bishop, definite responsibilities in respect of the buildings in his archdeaconry, and a right of visitation in order to ensure that these responsibilities are carried out.

The Rural Dean.

A Rural Dean is an officer appointed by the Bishop with a duty to make inspection and report generally on the condition of buildings within his deanery, and specially when placed on a commission of inquiry issued by the Bishop

[1] *Heywood* v. *Bishop of Manchester*, 12 Q. B. D. 404.

[2] Vol. i. Parliament, ch. vi, § 6, iv.

[3] The word 'dean' means in its origin that one of ten men who was responsible for the good behaviour of the rest. The secular tithing is a corresponding institution. The Dean is a person of authority, whether he is Dean of a chapter, of a peculiar, or of a college. The senior *decanus* became chief of the *decani*. Then the other *decani* disappeared and he became chief of the Society.

under the Clergy Discipline Act[1] or the Incumbents' Resignation Act[2].

Beneficed and unbeneficed clergy.

Beyond these officers of the Church is the body of beneficed clergy with a freehold tenure of their office; beyond these again is the body of the clergy unbeneficed, or holding offices not as property but by contract, such as curates or chaplains.

Status of one in Orders.

With these we are only concerned in so far as the *status* of a person in Orders differs from that of a layman.

Disabilities.

The person in Orders is subject to certain statutory disabilities. He cannot be chosen to serve in the House of Commons[3], nor hold municipal office[4], though he is not disqualified from being a member of a county council. He cannot, while holding any ecclesiastical preferment, occupy himself in farming or in trading.

Immunities.

He enjoys certain immunities. He is exempt from serving on juries, and from arrest while performing divine service, and on his way to or from the performance of service.

Liability to Ecclesiastical law.

He is subject to canons imposing rules of conduct which do not bind the laity, and the sanction which enforces them may affect his title to the preferment which he holds, and even his personal liberty.

Monition, Suspension, Deprivation are the forms in which the sentence of an ecclesiastical Court may be expressed.

The offender may be *admonished* to do or abstain from doing a specific thing. He may be *suspended* from the exercise of his clerical functions. He may be *deprived* of his preferment. If he contumaciously disregard the sentence of the Court he may be subject to imprisonment. Like the soldier or sailor, he is subject to an exceptional code, enforced by an exceptional procedure, and like them he is protected by the secular Court, which restrains excess of jurisdiction by writ of *Prohibition* and improper restraint of the person by writ of *Habeas Corpus*.

Means of escape.

He cannot get rid of his Orders except by a special procedure provided by the Clerical Disabilities Act[5], which enables him so to divest himself of his clerical character as

[1] 3 & 4 Vict. c. 86. [2] 34 & 35 Vict. c. 44. [3] 41 Geo. III, c. 63.
[4] 45 & 46 Vict. c. 50, s. 15. [5] 33 & 34 Vict. c. 91.

to become capable of entering the House of Commons or holding municipal office.

I have indicated in the passages which have gone before the mode of appointment to the offices I have described.

Powers of appointment.

The Crown (acting on the advice of the Prime Minister) appoints Archbishops, Bishops, and Deans of Chapters; Canons are appointed either by the Crown or by the Bishop of the diocese; Archdeacons and Rural Deans by the Bishop. The right of presentation to rectories, vicarages, and other like preferment, is a right of property which may be vested in the Crown or in a subject, but the Crown has, by prerogative, the right to present to a benefice, and it would seem also to an archdeaconry or canonry, when it has created the vacancy by making the previous holder an English bishop[1].

§ 3. *Ecclesiastical Property.*

The Church of England is not a corporate body. It is a religious society within which many corporations exist. They exist for the purpose of promoting the objects of the society, and they have at different times received endowments mainly from private munificence. The only general liability enforced by law for the benefit of the Church is the payment of tithe. This liability is not, nor was it in its origin, an endowment of the Church by the State. It was a voluntary payment; the duty to make it was preached by the Church, and when the duty came to be generally recognized it was enforced by the State. It is now commuted for a charge upon land, varying in amount with the septennial average price of corn; it is an article of property, of the nature of realty, not tenable only, or necessarily, by ecclesiastical persons.

Tithe.

[1] The limits of this prerogative are discussed in the case of *The Queen against the Provost and Fellows of Eton College*, (1857) 27 L. J. Q. B. 132, 8 E. & B. 610. 'The general *dictum*, that if an incumbent is made a bishop the Crown shall present to his preferment thereby vacated, cannot be relied on: for this evidently was meant to be understood of English preferment, and an English bishopric, and the same writers who lay this down say that the rule does not extend to a titular bishop or suffragan under 26 Hen. VIII, c. 14.' It was held not to extend to a colonial bishop.

Dismissing, therefore, the question of a state endowment of the Church it remains to ask in what way the property of the various corporations within the Church comes into contact with the State otherwise than as all property is protected by the Courts of the State.

Queen Anne's Bounty;

Queen Anne's Bounty is a restoration by the Crown to Church purposes of money derived from Church property. 'First-fruits,' or the first year's profit of the bishopric, or other ecclesiastical benefice, and 'tenths,' or an annual tax on the rateable value of all benefices, were exactions made by the Pope upon the estate of the clergy before the Reformation.

Henry VIII appropriated these to the Crown, and they became a source of royal revenue, the amounts being calculated on a valuation made in the reign of Henry VIII.

Queen Anne restored this revenue to Church purposes, obtaining power from Parliament[1] to create by letters patent a corporation upon which should be settled for ever the produce of these first-fruits and tenths. The Governors of Queen Anne's Bounty, constituted in pursuance of this Act, manage this fund, applying it partly in loans, repayable over a series of years, for the building of residences for the clergy, partly in augmenting poor livings, on condition that sums equal or greater in value to those which they apply to such augmentation are advanced by private gift.

supplemented for a time by Parliament.

For eleven years, from 1809 to 1820, Parliament granted £100,000 a year in aid of this fund[2]; apart from this the fund has consisted entirely of the first-fruits and tenths claimed from individual benefices by the Pope, appropriated by Henry VIII, and restored, for general Church purposes, by Anne.

The Ecclesiastical Commission.

The Ecclesiastical Commission is a body incorporated by 6 & 7 Will. IV, c. 77, and somewhat altered in its composition by 13 & 14 Vict. c. 94. These Acts provide for the management and distribution of episcopal and capitular estates.

[1] 2 & 3 Anne, c. 20.

[2] Lord Selborne, Defence of the Church against Disestablishment, p. 162.

'Under their provisions the income of all the Archbishops and Bishops of the sees then existing were regulated and fixed at their present amounts, some of them having been excessive while others were small and inadequate. . . . What was thought superfluous in the establishment of the several capitular bodies was retrenched, the number and stipends of their canons and assistant ministers being fixed by law[1].'

After these arrangements had been made the proceeds of the estates assigned to the management of the Commissioners produced a surplus available for general Church purposes, and this was treated as a common fund and applied to the endowment of new livings or the increase of poor livings in populous places.

For the adjustment of the revenues of the Church to local requirements the Ecclesiastical Commissioners have very considerable powers, chiefly in the arrangement of boundaries. With these we are not concerned, except to note that the State has taken upon itself the management of large estates belonging to corporations within the Church as the most convenient mode of ensuring the distribution of the income thence arising for the benefit of the entire society.

Section IV

The Scotch Church

§ 1. *Introductory.*

The English Reformation was led and controlled by the King; the Scotch Reformation was a popular movement. Its doctrines were set forth in audience of the whole Parliament on August 17, 1560.

'Knox and his compeers were present to support their supplication; the bishops, in their place in Parliament, were invited to impugn the articles proposed; and all the forms of a free and deliberate voting of the doctrine *as truth*—as the creed of the Estates, not of the Church—were gone through. It was a doctrine "professed by the Protestants," exhibited by

[1] Lord Selborne, Defence of the Church against Disestablishment, p. 164.

them "to the Estates, and by the Estates voted as a doctrine grounded upon the infallible word of God [1]."'

A form of Church government by presbyteries and a general assembly was the outcome of this movement. In 1647 the creed of 1560 was superseded by the Confession of Faith drawn up at Westminster in that year by an assembly of Puritan divines and accepted by the Scotch General Assembly: the Presbyterian form of Church government having been already affirmed. The national character of the Scotch Church was strengthened and deepened by the persecutions of the last Stuarts, who endeavoured to enforce the episcopal constitution of the English Church. Soon after the Revolution two important statutes were passed, one in 1690 for 'ratifying the Confession of Faith and settling Presbyterian Church government': another in 1693 'for settling the Peace and quiet of the Church,' imposing this confession as a standard of doctrine upon all ministers in the Church. The constitution of the Church Courts had been settled as early as 1592 and has not varied. The settlement of 1690, 1693 was confirmed in 1705 by an Act of Security passed by the Scotch Parliament and incorporated into § 5 of the Act of Union, whereby it is enacted that the 'Act for securing the Protestant religion and *Presbyterian Church government, with the establishment* in the said Act contained,' is to be a 'fundamental condition of the Union,' and 'to continue in all times coming.'

Definition of creed.

Establishment.

Act of Security.

In some details this settlement has been modified, but in all important features it has been maintained.

§ 2. *Mode of Government.*

Premising that the articles of faith of the established Presbyterian Church have been defined by general assemblies of the Church and their definition perpetuated by Statute, it follows that we must note the existing form of Church government and its connexion with the State.

[1] Taylor Innes, Law of Creeds in Scotland, p. 13.

The administrative, judicial, and legislative powers of the Church are in the hands of four bodies.

The Kirk Session.

At the bottom of the scale is the Kirk Session, corresponding to the English vestry, wherein the minister and a small number of elders, not less than two, superintend matters of discipline and worship, and the administration of parochial charities.

The Presbytery.

Above this body is the Presbytery, a word used sometimes to mean an assembly, sometimes the district from which the assembly is gathered. It consists, as an assembly, of all the ministers within the, geographical, limits of the Presbytery, and the Professors of Divinity (being ministers) of any University within those limits. The number of these bodies is fixed by the General Assembly; it is now between eighty and ninety.

The Presbytery is a Court of Appeal from the Kirk Session, and discharges besides, in relation to the ministry, functions corresponding to those of the English episcopate. It examines candidates for the ministry, confers licence to preach, ordains, approves persons presented to parishes, inducts them and supervises their conduct in the ministry.

The Synod.

The Synod stands next above the Presbytery, and acts as an intermediate Court of Appeal from that body. The Synod consists of the members of all the presbyteries within its bounds. Of such bodies there are now sixteen.

The General Assembly.

The General Assembly is the supreme legislative and judicial body in the Scotch Church.

It consists of two ministers from every presbytery; one elder or more from each presbytery, and one from each royal burgh; and either a minister or an elder from each University. Thus, unlike the English Convocation, it contains a fair representation of lay members of the Church.

§ 3. *Relations of Church and State.*

Its powers,

The relations of the Assembly to the Crown are peculiar. It meets on a day named simultaneously by the Moderator who presides over its deliberations and the Royal Commis-

sioner who is present to represent the Crown but takes no part in discussion.

legislative,

Legislation takes place, without royal initiation or assent, in the form of *overtures*. These are resolutions passed by the General Assembly and submitted to the presbyteries throughout the kingdom. When approval of the presbyteries has been signified these resolutions become law: but sometimes Acts are passed which have the force of law unless the presbyteries should express dissent. The powers of the General Assembly are very wide. In legislation it is not hindered by the need for letters of business or licence to make or alter canons without which the English Convocation cannot act.

judicial,

In judicial matters it is a final Court of Appeal. No superior court of secular judges, corresponding to the Judicial Committee of the Privy Council, can review its decisions; nor does it seem that anything in the nature of a writ of Prohibition can restrain its judicial action.

But the General Assembly is bound by the law of the land, and in the case of an Established Church this limit on its legislative and judicial action does not mean merely that it must not invade civil rights. The law of the land, for an establishment, means not only the general law, but the Statutes by which its faith, discipline, and principles of government have been fixed.

limited by the establishment.

This principle was enforced upon the Assembly in the proceedings which led to the disruption of the Scotch Church and the formation of the Free Church in 1843. An Act of 1711 [1] restored and confirmed the rights of lay patrons to present to pastoral charges. In 1834 the Assembly claimed for the presbyteries the right to refuse to admit a person whom the Congregation was unwilling to accept. The Courts upheld the statutory rights of the patrons. The Assembly does not seem so much to have claimed the right to exercise a discretion in individual cases, as an inherent right to act independently of statute law in matters appertaining to Church government [2].

[1] 10 Anne, c. 12.

[2] See *Presbytery of Auchterarder* v. *Lord Kinnoul*, 6 Clark & Finnelly, 646, and compare with *Heywood* v. *The Bishop of Manchester*, 12 Q. B. D. 404.

The Free Church.

Whatever might have been the view of a court of law as to the rights of the Assembly to insist that lay patrons made a reasonable use of their powers, it was impossible to admit the right of the Assembly to override the law of the land. The Assembly was forced to yield, and a large secession from the Established Church was the result of a prolonged and interesting struggle[1].

But the Free Church, constituted as the result of this secession, illustrated in course of time the principle that no society, religious or secular, which possesses large property held upon trusts, is exempt from legal control. The Free Church of Scotland admitted to its membership, by the decision of a majority of its governing body, the United Free Church of Scotland, a society whose profession of faith differed in some particulars from that formulated by the seceders of 1843.

The United Free Church.

The minority, a small body in comparison, raised the legal question whether the society thus constituted was entitled to enjoy the privileges and property which belonged to Free Church membership. The matter came for decision before the House of Lords in 1904[2], and the majority of the Court held that the identity of a Church was to be found in its doctrines, creeds, and formularies; that the power to change these, and still to retain this identity, must not be assumed, but must be shown to exist, and to have been provided for in the original conditions of membership; that the existence of this power was not proved, and that the majority of this United Free Church had committed a breach of trust which disentitled them to the enjoyment of the property belonging to the society.

The judgment of 1904:

This decision, based upon a rigid construction of trusts[3], had

The Presbytery, it should be noted, claimed to refuse the presentee without alleging any further disqualification than that the Congregation objected to him.

[1] In Chapter iii of Mr. Taylor Innes' Law of Creeds in Scotland, and in the appendices to the Chapter, may be found a full account of the controversy.

[2] *Free Church of Scotland* v. *Lord Overtoun* [1904], A. C. 515.

[3] The dissenting judgment of Lord Macnaghten suggests that it might have been possible to combine a regard for the rules of construction, even

a further result beyond showing that a voluntary religious society, where disputes arise as to the right to enjoy its property, is subject to the interpretation of its doctrines by a Court of law. The minority, who had succeeded in establishing to the satisfaction of the House of Lords that they were, in point of doctrine, the genuine Free Church of Scotland, were so small a body that they were unable to carry out the trusts for the observance of which the property had been given. The intervention of the legislature became necessary, and by 5 Ed. VII, c. 12, a Commission was appointed with power to allocate the property of the Free Church as between the parties to the dispute in accordance with the practical religious needs of the two bodies.

results of the judgment.

Section V

The Church in Ireland, India, the Colonies.

The Irish Church is now a voluntary society, but th process of its disestablishment, disendowment, and partial re-endowment affords some illustration of the character of an Established Church.

The Irish Church was, by the Act of Union, united to the English Church 'in doctrine, worship, discipline, and government.' But no meeting of the Convocation of the Irish Church had taken place for 200 years[1].

By the Act of 1869 (32 & 33 Vict. c. 42)—

(1) The union of the two Churches, created by the Act of Union, was from a certain date dissolved, and it was enacted that from that date the Church of Ireland should cease to be established by law.

The Process of disestablishment.

(2) Existing ecclesiastical corporations, whether aggregate or sole, were dissolved. Where a corporation is dissolved its proprietary rights also disappear.

(3) All rights of patronage, including the right of the Crown to nominate Bishops and other dignitaries of the

in the case of trusts, with some consideration for the declared views and intentions, as to its doctrinal development, of a great religious society.

[1] Hansard, vol. cxciv, p. 423.

Church, were taken away. In case of private patrons provision was made for compensation.

(4) The Archbishops and Bishops, ceasing to be nominated by the Crown, ceased to be spiritual peers, and lost such rights as they possessed to sit in the House of Lords.

(5) Ecclesiastical jurisdictions and ecclesiastical law, as a part of the law of the land, were abolished. But the ecclesiastical law was to be binding on the members of the Church as constituting the terms of a contract into which they had entered, and which would endure until altered by a body representative of clergy and laity.

(6) Power was given to the Crown to incorporate such a body, when constituted, so as to enable it to hold property.

(7) Until such incorporation the entire property of the Irish Church was vested in a Commission which was intended to carry into effect three purposes, (α) compensation for life interests affected by the change; (β) the transfer to the newly-incorporated society of the churches, glebe houses, and a sum of £500,000 in compensation for endowments made by private persons since 1660; (γ) the retention and management of the residue for such purposes as Parliament might thereafter determine.

Comparison of Irish, Thus the Irish Church is a voluntary society with full powers of self-government, including, as it would seem, the power to alter its doctrines and its constitution.

Scotch, The Scotch Church is an establishment with ample powers of self-government, limited by the fact that its doctrine and constitution are stereotyped in the statute book—are not matter of private contract but are part of the law of the land.

English Churches, The English Church is an establishment which, while it enjoys a greater dignity in its connexion with the State, enjoys also very limited powers of self-government, being controlled at every turn by the Crown and the Courts.

other religious bodies. But no voluntary society, however free, can escape subjection to the general law of the land, because its members are entitled to an observance of the terms on which they were invited to join it. And if a majority determine

to alter the constitution or creed of the society the law courts must determine disputed rights of property between the majority and the dissentient minority.

The Free Church.

And a voluntary society may so fix its articles of faith and conditions of government as to deprive itself of the power of development or change. This has been done by the Free Church of Scotland in a deed of settlement which, as has been shown on a preceding page, was held to be irrevocably binding upon the members of the Church as a title to the property of the Society.

The Irish Wesleyan Methodists.

It has also been done more precisely by the Primitive Wesleyan Methodist Society of Ireland, which has put its doctrine, discipline, and rules into an Act of Parliament[1], with a provision that the discipline and rules may be altered in a manner prescribed by the Act but that the doctrine is not to be altered.

India.

In India the Crown has power by Statute to create certain bishoprics, and to confer and define episcopal jurisdiction[2].

The Colonies.

The tangled history of the Church in the colonies can be but briefly touched upon here. The extent of the royal prerogative in relation to the Church, whether in Crown colonies or settled colonies, has been the subject of much dispute and perhaps of needless confusion. We must keep apart the episcopal *status* and the episcopal jurisdiction, and then we may arrive at a clear understanding of the matter.

One may say that though the King cannot consecrate a bishop, yet that in England a bishop cannot be consecrated without his assent[3] expressed in one or other of several forms.

The King cannot, however, introduce into a colony the ecclesiastical law and the apparatus for enforcing it. Outside England he cannot create or confer episcopal jurisdiction; save, as in the case of the Indian bishoprics, in

[1] 34 & 35 Vict. c. 40.

[2] 53 Geo. III, c. 155; 6 Geo. IV, c. 85; 3 & 4 Will. IV, c. 85.

[3] See judgment of the Master of the Rolls in the *Bishop of Natal* v. *Gladstone*, L. R. 3 Eq. 49.

exercise of statutory powers. For it is laid down by Lord Coke, and was accepted by the Privy Council[1] as a settled constitutional principle, that the Crown cannot establish new Courts to administer any law but the Common law.

The Church in South Africa.

The misadventures of the Church in South Africa have furnished illustrations of the rules which I have laid down. There the Crown was advised to issue letters patent for the creation of a diocese (Cape Town), and the appointment of a bishop with episcopal jurisdiction, and subsequently to subdivide this diocese into three, placing the Bishop of Cape Town in the relation to the other two of Metropolitan to suffragan bishops. The arbitrary and unjudicial action of the Bishop of Cape Town brought into question the validity of the letters patent under which he claimed jurisdiction.

Prerogative for creating jurisdiction.

In the first of a series of cases it was held that his letters patent were invalid to confer jurisdiction in a settled colony with a representative legislature[2].

In the next case[3] which arose, Bishop Gray (of Cape Town), in the exercise of his supposed powers as Metropolitan, professed to try, condemn, deprive and excommunicate Bishop Colenso (of Natal), and it was held that the letters patent of the two bishops did not confer upon the one the rights, or impose upon the other the liabilities, asserted by Bishop Gray. In this case, although the Privy Council again speak of the limitation of this exercise of the royal prerogative in colonies with *legislative* institutions, yet the principle laid down and the adoption of the language of Lord Coke would seem to cover the case of all colonies, and to conclude the right of the Crown to create any ecclesiastical jurisdiction unless under powers conferred by Parliament.

In the third case[4], however, it was held that although Bishop Colenso had not acquired or become liable to any jurisdiction in virtue of his letters patent, yet that he was

[1] *In re the Bishop of Natal*, 3 Moore, P. C., N. S., 115.
[2] *Long* v. *The Bishop of Cape Town*, 1 Moore, P. C., N. S., 411.
[3] *In re the Bishop of Natal*, 3 Moore, P. C., N. S., 152.
[4] *Bishop of Natal* v. *Gladstone*, L. R. 3 Eq. 1.

thereby constituted Bishop of Natal in point of *status*, and was entitled to demand the payment of money held by trustees for the endowment of the bishopric.

Since that date it has been the practice, when a colonial bishop is consecrated in England, to issue a licence under the sign manual and signet for the consecration. So we may note that authority for the consecration of a bishop may proceed from the Crown in five ways. Royal authority for consecration:

For an English bishop, a licence to elect (*congé d'élire*), followed by a mandate in the form of letters patent for his confirmation and subsequent consecration. The bishop then has the jurisdiction conferred by the ecclesiastical law. of English bishop,

For a suffragan bishop, under the provisions of 26 Hen. VIII, c. 14, there must be first a submission to the Crown of two names by the bishop who desires the assistance of a suffragan. Then the Crown by letters patent requires the archbishop of the province to do what may be required to confer the degree and office of bishop upon that one of the two persons named whom the Crown may choose. The bishop so created has such powers as may be committed to him by the bishop of the diocese wherein he is to act. of Suffragan bishop,

For an Indian bishop, letters patent are granted, conferring the dignity and the jurisdiction, under the provisions of the statutes above cited. of Indian bishop,

For a colonial bishop, a licence is issued under the sign manual. The following form may serve as an illustration :— of Colonial bishop,

VICTORIA.

Victoria by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the most Rev. Father in God, by Divine Providence Lord Archbishop of Canterbury, Primate of all England and Metropolitan, Greeting.

Whereas you the said Archbishop have humbly applied to Us for our Licence by Warrant under our sign manual and signet, authorizing and empowering you to consecrate our trusty and well-beloved to be a bishop to the intent that he should execute his functions in one of our

possessions abroad: Now it is our will and pleasure and we do by this our licence under our sign manual and signet authorize and empower you to consecrate the said
to be a bishop: and we do further authorize and empower you to do, perform and execute all and singular those things which belong to your pastoral office in respect of such consecration as aforesaid, according to the laws, statutes and canons in this behalf made and provided.

Given at our Court at this day of , 18 .

By Her Majesty's command.

(The warrant is countersigned by the Secretary of State for the Colonies.)

of missionary bishop.

In the case of a bishop consecrated for the purpose of discharging episcopal functions in foreign countries a licence is issued in nearly the same form; differing in this, that it recites Acts[1] by which consecration for such purposes was rendered lawful without the issue of a licence to elect or mandate for confirmation, and solely on the authority of a licence by sign manual warrant. The warrant is also issued from the Foreign Office instead of the Colonial Office, and is countersigned by the Secretary of State for Foreign Affairs.

In Scotland, Ireland, and in the British possessions outside England a bishop may be consecrated by other bishops without licence from the Crown.

[1] 5 Vict. c. 6, amending 26 Geo. III, c. 84.

CHAPTER X

THE CROWN AND THE COURTS

The Courts in connexion with central government:

In treating of the Crown and the Courts it is more than ever necessary to recollect that we are treating them from the point of view of the central government. The King is 'over all persons in all causes, as well ecclesiastical as civil, within his dominions supreme.' The King is the 'fountain of justice.' What then are the Courts, and how composed, by which this royal supremacy is exercised; through which this stream of justice flows for the benefit of the subject.

It will also be necessary to treat more especially of the judicial organization of England and Wales. As in dealing with local government I described in some detail that system which is nearest home and most closely connected with the central departments, so in dealing with the Courts I must pass over lightly the Courts of Scotland and Ireland, of India, of the Colonies, and of the foreign jurisdictions, chiefly insisting on the manner in which all the threads of justice are drawn together and unite in the two great Courts of Final Appeal.

I will arrange the subject thus—

proposed arrangement.

§ 1. The civil and criminal jurisdictions merged in the Supreme Court.

§ 2. The constitution of the Supreme Court of Judicature.

§ 3. Inferior civil and criminal jurisdictions.

§ 4. Jurisdictions outside the High Court.

§ 5. The Courts of Final Appeal.

§ 6. The Crown in relation to the Courts.

Section I

Jurisdictions merged in the Supreme Court

§ 1. *History of the Courts.*

Civil and criminal jurisdictions.

The beginnings of the distinction between civil and criminal jurisdictions are matters of history, too remote for our present consideration. It is enough to note present differences. The civil jurisdiction protects private rights, the criminal jurisdiction punishes offences against public order or well-being[1]. The object of a civil action is to secure a right or obtain compensation for its infringement: the object of a criminal suit is to obtain punishment for the offender. Only the person interested may set in motion the course of civil justice, but a crime is against the peace of our Lord the King: a prosecution may be commenced by any one in the King's name. In a civil case the party complaining may forgo his rights, but the King cannot exonerate his adversary. In a criminal case the party injured cannot condone the offence done to the public, so as to stop a prosecution, but the King can do so by staying proceedings or by exercising the prerogative of mercy. Distinct as are civil and criminal proceedings at the present day, we cannot expect to find them so in the early days of legal history. The State was not strong enough to punish offences against order. The utmost it could do was to regulate the action of the individual in redressing injuries.

The folk's peace and the King's peace.

The King is not, historically, the fountain of justice. The peace, that is the order in which men should live, was not in the first instance the King's peace. Self-redress, the maintenance by the individual of his own peace, gave way to the peace of the folk: the peace of the folk, as the

[1] Certain offences are made the subject of criminal proceedings, though not of the moral character which we associate with a crime, because they constitute an injury or failure of duty to the public and cannot be dealt with as a matter of private wrong, e. g. an indictment of a local authority for non-repair of a highway. Certain others are made subjects of civil proceedings to recover a penalty, in order to prevent a pardon from interfering with public rights, e. g. the penalties imposed by the Habeas Corpus Act and those for disqualified persons voting in the House of Commons.

kingdom settled, became the peace of the King[1]. But no sooner had the peace of the King become the national peace than the decentralization of justice began again, as the King granted jurisdiction to great lords over their lands.

The Saxon Courts.

In Saxon times we may say that justice was a matter of State concern to this extent, that the King was the guardian of the nation's peace, that where he granted away his jurisdiction over localities, he reserved to himself the power to deal with certain offences, the 'Pleas of the Crown,' and that in matters of civil right the King and witan were a court of final appeal from the local courts of the hundred and shire, wherein the folk-right was in the first instance declared.

The feudal courts.

Feudalism still further localized justice: the lord of lands had jurisdiction over the dwellers on his lands. But the administrative genius of the Norman Kings, and their strenuous determination that their justice should prevail against the local justice, did more than counteract the tendencies of feudalism. First the secular and spiritual jurisdictions were separated, and thus, besides matters which merely concerned the clergy, the ecclesiastical courts acquired a jurisdiction over such matters as tithe, and over testamentary and matrimonial causes where temporal and spiritual interests converged. These had hitherto come before the bishop in the shire moot. Then the appellate jurisdiction of the Curia was developed more completely than heretofore, and the practice of issuing writs or mandates brought the local officer into connexion with the central government. The King himself sat thrice a year at least, and heard cases and dealt out justice.

Secular and spiritual courts.

Writs.

The Curia as a Court of Appeal,

But generally the business of the Curia was to hear appeals from the local courts of the hundred and shire, to deal with cases in which the King's interest was concerned or in which two of the King's tenants-in-chief were parties, or by special favour with cases in which two subjects not being tenants-in-chief were parties.

and of first instance.

Writs, whether for directing local inquiry or for bringing cases before the King and his Court, emanated from the

[1] Stubbs, Const. Hist., i. 181, 185.

Curia: and throughout the reigns of Henry I and Henry II itinerant justices were sent on commission to represent the Curia for purposes of justice and finance in the shires. Compared with the procedure of the Courts of the shire and manor the justice done by the King's Courts was found to be more prompt and effective and as cheap and convenient. In the end the King's justice prevailed, and from the Curia the modern courts slowly emerge.

The beginnings of the King's Bench,

In 1178 two clerks and three laymen were appointed who should hear the complaints of the people and should not depart from the Curia Regis: they were to reserve cases of special difficulty for the King himself. This provision secured in permanence a staff devoted to the administration of justice, though individually no longer interchangeable with the financial staff of the Exchequer, and with the itinerant justices who went on the ever-varying circuits organized by Henry II [1].

This body of five, though limited to judicial duty, was designed to move with the King throughout the kingdom. It was a sitting of the *Curia in Banco*, and nominally if not actually *coram rege*. Here we find the beginning of the Court of King's Bench.

of the Common Bench,

A further step was made in the specializing of the judicial functions when suits between subject and subject, *communia placita*, were ordained by the 17th article of the Charter to be held in some certain place. Thus arose the Court of Common Pleas or the *Common Bench* as distinct from the *King's Bench*.

of the Exchequer.

The function of the Exchequer had always involved some inquiries of a judicial character, and while it became a department distinct from others it did not cease to be a court for revenue purposes.

Before the end of the thirteenth century comes to a close we can see the three great Common Law Courts as they existed until the Judicature Act came into operation in 1875.

Enlargement of jurisdiction.

The King's Bench dealt with all cases in which the King's interest or prerogative was concerned; the Common Bench

[1] Stubbs, Const. Hist., i. 601, 602.

with suits between subjects; the Exchequer with cases arising out of the collection of revenue.

But the King's Bench and the Exchequer desired to enlarge their jurisdictions. It was useless to pass a statute in 1300 forbidding the Exchequer to deal with Common Pleas except in so far as they might touch the King or the ministers of the Exchequer. Fictions were introduced into the pleadings of each Court, by which common pleas were brought within their cognizance, and while each retained its special business and some matters remained special to the Common Bench, all three Courts became, in the fourteenth century, for most purposes accessible to all.

But by the side of these Courts arose a department of government which was hereafter to acquire important judicial functions.

The Chancery as a department.

In the history of the gradual break-up of the Curia Regis the severance of the Chancery from the Exchequer was one of the most important incidents. Writs had hitherto issued from the Curia, but when the Chancery became a separate department such documents as required to be authenticated with the Great Seal would thenceforth issue from the Chancery, which was now the *officina brevium*.

The Chancery, however, did not remain a merely administrative department. When the three Common Law Courts had been developed out of the Curia there was still a residuary judicial power in the Crown. Those who were dissatisfied with the decisions of the Courts petitioned the Crown in Parliament, alleging error. Hence came the appellate jurisdiction of the House of Lords. But there were those who did not complain that the Courts were wrong, but that they could not afford the needed redress. Such complainants petitioned the Crown in person or the Crown in Council. I have described elsewhere the mode in which the Council dealt with such petitions [1], but at an early date it became customary, where the King's grace might be vouchsafed to the petitioner, to refer the matter

[1] Part i, p. 68.

The Chancery as a Court.

to the Chancellor. The Common Law Courts could order the restoration of land, and, in some cases, of chattels to the rightful owner, and could give damages for a contract broken, or injury sustained. The Chancellor did not meddle with the more remote remedy of damages: his procedure went directly to the root of the grievances complained of. The Common Law Courts could say, 'You shall pay or restore because of your wrongful act or omission.' The Chancellor could say, 'You shall carry out your undertaking —you shall refrain from your contemplated wrong.' Thus where it was desired to enforce the performance of a contract, or to set aside a transaction induced by fraud, or to compel one who had acquired land under the conscientious obligation that he would hold it to the use of another to carry out the terms of his trust, the Chancery was the resort of the suitor.

Equity.

Thus arose equity, supplementing the common law, acting always *in personam*, not awarding damages, or touching property, set in motion not by writ but by bill containing a petition addressed to the Chancellor: thereupon the individual was summoned by writ of *subpoena*, and bade to do, on pain of attachment, what a just and honest man would be expected to do under the circumstances of the case. Naturally the two systems come into conflict.

Conflict of Equity and common law.

The vague summons by *subpoena* with no cause of action shown was one of the earliest grounds of complaint. The evils of interference with the common law relating to land are recited in the preamble to the Statute of Uses. The ground of conflict in the succeeding century was the claim of the Chancery to restrain the successful suitor in proceedings at common law, by injunction, from taking the benefit of his judgment [1].

The gradual definition of equitable rules and procedure which was effected between the Chancellorships of Lord Nottingham and Lord Eldon must not detain us: we are concerned with the composition of the Courts, not with the law administered.

[1] See for a short and clear account of these struggles, Kerly, History of Equity, 112–117.

In order to get a clear notion of the various jurisdictions merged in the Supreme Court, we must touch upon a matter which I shall have to deal with again later, and must mention a jurisdiction which is still in some respects extraneous to the Supreme Court.

The Ecclesiastical Courts.

The Ecclesiastical Courts when severed from the secular courts carried with them some matters of a secular character—wills of personal property, the administration of the estates of those who died intestate, and matrimonial causes. The jurisdiction in these matters was, in the year 1857 [1], transferred to other tribunals, the Probate Court and the Court for Divorce and Matrimonial Causes.

Testamentary, and matrimonial causes.

There remains but one more civil jurisdiction of those which now are merged in the Supreme Court. The Court of the Lord High Admiral or his deputy had a customary jurisdiction, defined in the reign of Richard II [2] as relating to all manner of injuries committed at sea, not within the precincts of any county. It had a special jurisdiction conferred by commission to adjudicate on prizes of war and a criminal jurisdiction of which more hereafter.

The Admiralty Court.

§ 2. *Courts of first instance in* 1873.

I have indicated the origin of the Courts which were merged in the Supreme Court of Judicature; I must pass over their history; the fictions by which the King's Bench and Exchequer obtained a jurisdiction in suits between subject and subject, and the Exchequer an equitable jurisdiction as well; the gradual simplifications of procedure which were effected between 1830 and 1873.

I must confine myself to a bare account of the Courts, their jurisdictions and their judges as they existed in 1873, and for the moment I will deal only with civil jurisdiction.

The common law jurisdictions were those of the three great Common Law Courts.

[1] 20 & 21 Vict. cc. 77 and 85.

[2] 13 Rich. II, c. 5, and 15 Rich. II, c. 3.

The King's Bench.

The King's Bench was the first in rank of the Common Law Courts. There the King was always presumed to sit in person. It could deal with all suits between subject and subject, except such real actions as still survived. There were also certain matters special to the Court: the prerogative writ of *Mandamus*, commanding magistrates, or others exercising inferior jurisdictions, to discharge a duty: proceedings commenced by the law officers of the Crown, having the effect of the ancient writ *Quo Warranto*, by which title to the enjoyment of an office could be tried.

The Common Bench.

The Common Bench or Common Pleas had a general jurisdiction in suits between subject and subject, a special jurisdiction in some formalities which survived the abolition of the real actions and the practice of fines and recoveries, and a special jurisdiction by way of appeal from the decision of revising barristers, and in questions of law arising out of disputed returns under the Parliamentary Elections Act, 1868.

The Exchequer of Pleas.

The Court of Exchequer lost its equitable jurisdiction in 1841 [1], and was in 1873 a court of revenue and a court of pleas, dealing in the first capacity with the rights of the Crown against the subject, in the second, with all suits except such as were special to the other Common Law Courts.

The Courts of Chancery,

The Court of Chancery, from the time that the Court of Exchequer lost its equitable jurisdiction, had the exclusive dealing with the entirety of the remedies and rights which had grown up under its care. Efforts to apply equitable remedies in the Common Law Courts had failed of success.

of Admiralty,

The Admiralty Court with a jurisdiction defined and extended by 3 & 4 Vict. c. 65, and 24 & 25 Vict. c. 10, dealt with injuries committed and contracts wholly arising at sea, following rules derived in great part from the civil law.

of Probate,

The Court of Probate had absorbed all ecclesiastical and other jurisdictions to grant or revoke Probate of Wills or letters of administration of the effects of deceased persons.

[1] 5 Vict. c. 5.

The Court for Divorce and Matrimonial Causes had in like manner acquired all jurisdictions previously existing in such causes, and followed the procedure of the Ecclesiastical Courts, except as to the new law and practice, prescribed in 20 & 21 Vict. c. 85, concerning the dissolution of marriage. of Divorce.

Each of the Common Law Courts, until the year 1830, consisted of four judges—a chief justice and three *puisne* judges in the King's Bench and Common Pleas; a chief baron and three barons of the Exchequer. In 1830 a fourth puisne judge was added to each Court, and a fifth in 1868. The number of judges. Common Law.

The Chancery, as a Court of justice, was manned, until the commencement of the present century, by the Chancellor and the Master of the Rolls, who, from being the chief of the Masters in Chancery, and mainly concerned with the custody of documents, began in the time of Wolsey to discharge the functions of a judge, in aid o the Chancellor. But the theory that he was the Chancellor's deputy was so far sustained that he only sat when the Chancellor was not sitting[1]. For the Chancellor himself *was* the Chancery for judicial purposes; as equitable remedies became more popular, or at any rate more widely used, and the business of the Chancery increased, it became necessary to appoint other judges, but these were merely instruments for discharging duties which the limits of human capacity prevented the Chancellor from discharging in person. Chancery.

Therefore in 1813 it became necessary to create a new Court of first instance in Equity, that of the Vice-Chancellor of England. In 1841 the equitable jurisdiction of the Court of Exchequer was taken away, and two more Vice-Chancellors were appointed. Thus in 1873 there were as Courts of first instance in Chancery, the Chancellor, the Master of the Rolls, and three Vice-Chancellors.

The Admiralty Court was presided over by a single judge, but it was provided in 3 & 4 Vict. c. 65 that the Admiralty.

[1] There seems to have been some dispute as to the jurisdiction of the Master of the Rolls, and after he had acted for two centuries as a judge an Act was passed (3 Geo. II, c. 30) to settle all doubts on the subject.

Dean of Arches might sit for the judge, and as a matter of fact the Dean of Arches and the judge of the Admiralty Court were the same person. The functions of the Dean of Arches fall under another section.

Probate. The Act which constituted the Probate Court empowered the Crown to appoint a judge of the Court; and the Act

Divorce. which constituted the Court for Divorce and Matrimonial Causes manned it with a staff consisting of existing judges, of whom the judge of the Court of Probate was to be the Judge Ordinary.

§ 3. *Courts of Intermediate Appeal in* 1873.

From all these Courts, except the Admiralty and Probate Courts, there was an intermediate appeal, before reaching the Court of final appeal.

The Exchequer Chamber. From the three Common Law Courts, error or appeal lay to the Exchequer Chamber[1], a Court constituted by 11 Geo. IV and 1 Will. IV, c. 70, s. 8, and composed of judges chosen from the two Courts whose decision was not in question.

The Court of Appeal in Chancery. From the Courts of first instance in Chancery an appeal lay to the two Lords Justices of Appeal sitting with or without the Chancellor. This Court came into existence in 1851[2] to relieve the Chancellor, who till then was the sole intermediate Court of appeal between the Courts of first instance in equity and the House of Lords, where he would also be required to preside.

From the Admiralty there was no intermediate appeal. Cases went direct to the final appellate jurisdiction of the Crown in Chancery, under 25 Hen. VIII, c. 19, and 8 Eliz. c. 5. This jurisdiction was transferred to the Crown in Council in 1832[3].

From the Probate Court appeal lay directly to the House of Lords[4].

[1] The Court of Exchequer Chamber was first constituted a Court of Error by 27 Eliz. c. 8, because the long intervals between sessions of Parliament caused delay in getting decisions from the House of Lords.

[2] 14 & 15 Vict. c. 83.

[3] 2 & 3 Will. IV, c. 92.

[4] 20 & 21 Vict. c. 77, s. 39.

From the Court for Divorce and Matrimonial Causes appeal lay from the Judge Ordinary to the full Court, whose decision was to be final, save in the case of a petition for dissolution of marriage, when appeal lay thence to the House of Lords [1]. The full Court in matrimonial causes.

§ 4. *Criminal Jurisdictions.*

The Courts of Criminal jurisdiction which are merged in the Supreme Court, are those of the King's Bench, the Admiralty, and certain others with which I will presently deal.

The King's Bench on its *Crown* side, as distinguished from its *Plea* side, could take cognizance of all crimes, or of all things done against the King's Peace. It could do this, and, with certain limitations, could bring up all indictments from other jurisdictions by writ of *certiorari*. The King's Bench.

The Court of Admiralty had a jurisdiction over crimes committed on board ship, either on the sea or in the main stream of great rivers below bridge. But this jurisdiction had become practically unimportant, for by 24 & 25 Vict. cc. 96-8, all indictable offences committed at sea within the jurisdiction of the Admiralty of Great Britain or of Ireland are to be deemed the same in character and liability to punishment as though they had been committed in England or Ireland. The Admiralty.

§ 5. *The Circuit Commissions.*

The great courts of common law jurisdiction civil and criminal were localized, or rather centralized, at Westminster. But to bring all local causes to Westminster to be tried was hard alike on the suitor and the criminal.

Hence came the Courts held under *Commissions*, in virtue of which the judges made their *itinera* or circuits. The Commissions

Of these there were and still are three [2], the Commissions

[1] 20 & 21 Vict. c. 85, ss. 55, 56. The full Court was the Chancellor, the chiefs of the Common Law Courts, the senior puisne judge of each Court, and the judge of the Probate Court.

[2] The judges on circuit are sometimes said to sit in virtue of five commissions, made up by the addition of commissions of *nisi prius* and

of Assize, of Oyer and Terminer, of Gaol Delivery. The first conferred a civil, the two last a criminal jurisdiction.

of Assize, The commission of assize, as its name implies, was designed in its origin for the trial of the real actions, but the judges who were sent on these commissions were, very early, given power to try other issues[1], and the juries who were summoned to Westminster for the trial of such other issues were summoned conditionally, *nisi prius, unless before* the date of summons the justices commissioned to take assizes should come into the county.

Hence the commission of assize, in Blackstone's time, had come to mean, in practice, a duty to try 'common issues at *nisi prius*, hardly anything remaining of the real assizes except the name.'

of *Oyer and Terminer*, The commission of *oyer and terminer* directs the judges therein named, or any two of them, the serjeants, King's Counsel, and other officers of the Circuit, to 'inquire, hear, and determine' concerning treasons, felonies, and misdemeanours within the counties named, 'as *well within the liberties as without*[2].' The commission of *gaol delivery* is

of Gaol Delivery.

of the peace. But all the judges of the Supreme Court are in the commission of the peace for all counties, and *nisi prius* is an incident of the Commission of Assize.

[1] Stat. Westminster 2nd, 13 Ed. I, c. 30. 'Before the end of Edward the Third's reign, a series of enactments commencing with Magna Charta, including the Ordinance for Justices, 20 Ed. III, cc. 1–6, and ending with 42 Ed. III, c. 11, had conferred upon the justices of assize extensive powers of control over the authorities of the counties through which they passed (see Crompton on Courts, 206, et seq.), complete jurisdiction over all criminal cases (the highest in constitutional importance), exclusive jurisdiction over certain real actions, concurrent jurisdiction with the Courts at Westminster to give judgment in others, *and the power of trying at the most important stage all causes of the Courts of Westminster wherein questions were to be tried in the country*, which, under the old law of *venue*, involved almost every disputed question of fact taking place elsewhere than in London and Middlesex. The Statutes which conferred these large powers and extensive jurisdiction before the end of the reign of Ed. III, are Magna Charta, c. 12, Westminster 2nd, c. 30, Statute of Justices of Assize, 21 Ed. I, 27 Ed. I, cc. 3, 4, 12 Ed. II, cc. 3, 4, 2 Ed. III, cc. 2, 16, 4 Ed. III, cc. 2, 11, 12, 5 Ed. III, c. 14, 14 Ed. III, st. 1. c. 16, 9 Ed. III, st. 1. cc. 4, 5, 20 Ed. III, cc. 1–6, and 42 Ed. III, c. 11.' *per* Willes J. *ex parte Fernandez*, 10 C. B., N. S., 46.

[2] A Liberty is a district over which the Crown has granted to an individual or his bailiff the execution of legal process exclusive of the

addressed to the same persons, and bids them 'deliver the gaol of —— of the persons therein being.'

The practical difference between the two commissions seems to be that the first is to *inquire, hear, and determine*, and thus requires a presentment by a grand jury before the judge can act. Thus he can only proceed on indictment found at the same assizes, whereas the commission of gaol delivery enables the judge to clear the gaols of such prisoners as he may there find[1].

For Middlesex and the suburbs of Kent, Surrey, and Essex, standing commissions of oyer and terminer and gaol delivery have been issued since 1834, and judges sit monthly, in virtue of these commissions, to try prisoners at the Central Criminal Court or Old Bailey[2].

Appeal in disputed points of law.

Disputed questions of law arising in trials at *nisi prius*, whether before commissioners of Assize or judges at Westminster, went to the Court, in which the suit was begun, sitting *in banco*; thence in the course described above to the Exchequer Chamber and the House of Lords.

Civil.

Criminal.

Disputed questions of law arising out of trials of indicted persons might be dealt with in one of two ways. They might be taken by writ of error, where error was apparent on the record, to the Court of King's Bench, or, now, to the King's Bench Division; thence to the Exchequer Chamber or, now, to the Court of Appeal; and thence to the House of Lords. Or they might be reserved for the 'Court for Crown Cases reserved,' whose decision was final. This Court was constituted by 11 & 12 Vict. c. 78, and con-

Error.

Court for Crown Cases reserved.

sheriff. Means are taken at the present day to prevent inconvenience arising from such privileges.

[1] The early editions of Blackstone's Commentaries contain a Record of an indictment and conviction for manslaughter. The indictment is found a true bill by a grand jury before a judge sitting under a commission of *oyer and terminer*. The arraignment, trial, conviction and sentence take place at the next assizes under a commission of *gaol delivery*.

[2] 4 & 5 Will. IV, c. 36. It was the practice in the case of prisoners convicted and sentenced to death at the sittings in London before the Recorder, or afterwards before the Central Criminal Court, to make a report to the Sovereign before the sentence was carried into execution. This was discontinued at the commencement of the late reign, in pursuance of 7 Will. IV & 1 Vict. c. 77. The judge orders execution, and this is the sheriff's authority.

sisted of the justices of either Bench and Barons of the Exchequer or any five of them, of whom one must be the chief of one of the three Courts. It rested with the judge who tried the case to reserve a question of law, and he might only do so when the prisoner was convicted.

Until the Criminal Appeal Act came into operation in 1908 there was no appeal from a finding of facts in a criminal case save by application to the Home Secretary to advise the Crown to exercise the prerogative of mercy.

It only remains to note certain ancient local Courts, the Court of Pleas at Durham, of Common Pleas at Lancaster, which by virtue of the *jura regalia* once granted to the lords of these counties palatine enjoyed a jurisdiction separate from the Westminster Courts.

We may now consider the effect of the Judicature Acts of 1873, 1875, upon the jurisdictions with which we have dealt.

Section II

The Supreme Court of Judicature

§ 1. *Fusion of Jurisdictions.*

I have endeavoured in slight and imperfect outline to convey a general view of the Superior Courts as they existed in 1873, when the Judicature Act was passed, and until November, 1875, when it came into operation together with the Amending Act of 1875.

Jurisdictions fused.

We have before us the Chancery: the three Common Law Courts, from which judges went as commissioners on circuits to try civil cases commenced at Westminster and criminal cases arising in the counties where the commission was executed: the Admiralty, Probate and Divorce Courts, with their respective jurisdictions, and the intermediate Courts of Appeal from these various Courts of first instance.

The Judicature Act (1873) in its first section took all these Courts and consolidated them into one Supreme Court of Judicature.

It then cut this Court into two permanent divisions, a High Court of Justice, and a Court of Appeal: and proceeded to confer jurisdictions upon each.

To the High Court of Justice was given all the jurisdictions previously exercised by— Assignment to High Court;

The High Court of Chancery, as a Court of Common Law and of Equity:

The Courts of King's Bench, Common Pleas, and Exchequer:

The Courts of Admiralty, Probate and Divorce:

The Courts created by Commissions of Assize, Oyer and Terminer, Gaol Delivery, or any such Commissions:

The Palatine Courts of Pleas at Lancaster and Durham.

By the Bankruptcy Act of 1883, jurisdiction in Bankruptcy was handed over to the Supreme Court, and the jurisdiction of the London Court of Bankruptcy was assigned to the High Court of Justice.

To the Court of Appeal was given the jurisdiction and powers of the Lord Chancellor and Lords Justices of Appeal in Chancery, of the Court of Exchequer Chamber, and of the Privy Council in Admiralty appeals. to Court of Appeal.

§ 2. *Divisions of Supreme Court.*

We thus have two divisions of one great Court. The first exercising a general jurisdiction, civil and criminal, as a Court of first instance, and of appeal from inferior Courts: the other exercising a general appellate jurisdiction in civil cases from the decisions of the first.

Thus is concentrated, in one Court, equity and common law; the ecclesiastical and statutory jurisdictions enjoyed by the Courts of Probate and Divorce; the civil and criminal jurisdictions of the Court of Admiralty: the power to compel by *mandamus* the discharge of a public duty by persons or bodies on whom such duty may be cast: the power to restrain by *prohibition* an excess of jurisdiction by inferior Courts: the power by *certiorari* to take cases from them and bring them before itself. Concentration of jurisdictions in the High Court.

And these wide powers include the criminal jurisdictions of the Court of King's Bench, of the commissions of *oyer and terminer* and *gaol delivery*, and of the Court for Crown Cases reserved.

Criminal Appeal:

To the jurisdictions thus concentrated by the Judicature Act in the High Court of Justice we must now add the Appellate jurisdiction in criminal cases conferred by the Criminal Appeal Act[1], 1907.

The Court of Criminal Appeal there constituted consists of the Lord Chief Justice of England and eight judges of the King's Bench Division appointed by him with the consent of the Lord Chancellor.

Character of appeal:

The jurisdiction extends over all cases of persons convicted on indictment, criminal information, or coroner's inquisition, and the person so convicted may appeal against his conviction on a point of law: or with the leave of the Court or on certificate of the judge who tried him, on a question of fact, or of mixed law and fact: or with the leave of the Court against the sentence passed on him when convicted, unless the sentence is fixed by law.

If the appeal be on a question of law, which the Attorney-General certifies to be of exceptional public importance, and that it is in the public interest that the decision should be further considered, there is a further appeal to the House of Lords.

of tribunal:

It should be noted with regard to this tribunal that it is a new Appellate Court constituted within the King's Bench Division; and that it supersedes all such other methods as existed for questioning the interpretation of the law in criminal cases.

of decision.

The Act gives for the first time an appeal in criminal cases on questions of fact, and thus the character of a man who has been wrongly convicted may be cleared by a decision of the Court that the jury were wrong in their finding of the facts. Until the passing of the Act, an exercise of the prerogative of mercy by way of pardon was the only

[1] 7 Ed. VII, c. 23.

remedy for such a conviction, and a pardon necessarily assumes that there is something to be forgiven.

The prerogative of mercy.

It remains to note that although the Act provides an alternative to a petition for the exercise of the King's mercy, it in no way affects that branch of the royal prerogative. Only, it enables the Home Secretary either to refer a case submitted to him to the Court of Criminal Appeal (except an appeal against a sentence of death) or to obtain the opinion of the Court on any point arising out of the petition.

Concentration of appellate jurisdiction.

The Court of Appeal has not only an appellate jurisdiction in civil cases from decisions of the High Court, but also from jurisdictions outside the High Court, in matters of lunacy, of bankruptcy, in cases arising in the Chancery Court of the County Palatine of Lancaster, and in the Court of the Lord Warden of the Stannaries.[1]

§ 3. *Divisions of the High Court.*

The Supreme Court is divided into a High Court and a Court of Appeal: the High Court is itself divided for the sake of convenience, and business of a special character is assigned to each *Division* of the Court.

The Divisions.

In the first instance there were five such Divisions:— Chancery; Queen's Bench; Common Pleas; Exchequer; Probate, Divorce and Admiralty. But in 1881 Queen Victoria by Order in Council exercised a power conferred on her by the Act of 1873 and merged the Common Pleas and Exchequer Divisions in that of the Queen's Bench.

s. 34 (1873). Their business.

The business assigned to each Division corresponds to its ancient jurisdiction, but the change effected by the Act is marked in two ways. (1) Any judge may sit in a Court belonging to any Division, or may take the place of any other judge. (2) Any relief which might be given by any of the Courts whose jurisdiction is now vested in the Supreme Court, may be given by any judge or Division of the Supreme Court: and any ground of claim or defence which would have been recognized in any of the old Courts

The fusion of law and equity.

[1] 36 & 37 Vict. c. 36, s. 18.

may be recognized in any Division or by any judge of the new Court. Where rules of equity, common law, or admiralty conflict, the Act states which rule is to prevail in the future, and in cases not specifically provided for enacts that, where law and equity conflict, equity is to prevail.

ss. 24, 25 (1873).

But this is not the place to discuss the law administered or procedure adopted in the Supreme Court, further than is necessary to explain its constitution. I will note the points in which it comes into contact with the central executive.

§ 4. *The Judges of the Supreme Court.*

Judges of the High Court.

The High Court consists of three Divisions containing unequal numbers of judges. The Chancery Division consists of the Lord Chancellor, who presides, and five judges. The King's Bench Division contains the Lord Chief Justice of England, who presides, and fourteen judges. The Probate, Divorce and Admiralty Division has but two judges, the President and another.

Their appointment.

All these judges, save the Chancellor, are appointed by letters patent under the Great Seal on the advice of the Chancellor.

Their tenure.

They are required to take the judicial oath and thereafter hold office during good behaviour, but may be dismissed on address of both Houses of Parliament. They are appointed to specific Divisions of the High Court, but any one may sit for another in any divisional court[1], and the King may, by sign manual warrant, transfer a judge permanently from one Division to another[2].

s. 31 (1873).

The Court of Appeal is composed of the Master of the Rolls and five Lords Justices similarly appointed. It usually sits in two divisions of three judges, but for certain purposes two will suffice. Until 1881 the Master of the Rolls was a Judge of the High Court. Since the passing of 44 & 45 Vict. c. 68 he is a Judge of Appeal only. Since 1891 those who have served in the office of Lord Chancellor

Lords Justices of Appeal.

[1] 47 & 48 Vict. c. 61, s. 6.
[2] 36 & 37 Vict. c. 66, s. 31.

are *ex officio* Judges of Appeal, but sit only if they consent to do so on the request of the Chancellor[1].

The King continues to issue the commissions under which the judges went circuit before 1875, but the commissioner acting under such commission is to be 'deemed to constitute a court of the said High Court of Justice.' His powers are not therefore limited by the terms of this commission, for he can do, in respect of the matters brought before him, everything that a judge of the High Court sitting at Westminster could do. The circuit Commissioners.

The Judicature Act of 1875 conferred power on the Crown by Order in Council to alter the circuits, and two subsequent Acts gave powers of the same character for grouping counties for the purpose of Winter and Spring Assizes. The circuits have undergone more change by this means since the Act came into operation than at any time since the reign of Henry II.

The same Act empowers the King by Order in Council, on recommendation of the Chancellor and certain of the judges, to make rules for the pleadings, practice, and procedure of the Supreme Court. The power thus given, the authority under which the rules are made, and the procedure for making them are modified by s. 17 of the Appellate Jurisdiction Act (1878), s. 19 of the Judicature Act of 1881, and the Rules Publication Act, 1893. The rules when made must be laid before both Houses of Parliament within forty days of making, or of the beginning of the next session after their making, and come into force unless within the next forty days either House addresses the King to annul them. Under these provisions a code of procedure was drawn up in 1883 and, with subsequent additions, is still in force. s. 17 (1875). Rules of procedure.

A Council of judges of the Supreme Court is required to meet annually[2] to consider defects and proposed amendments in the administration of justice, and report the same to the Home Secretary for the consideration of the Executive.

[1] 54 & 55 Vict. c. 53.
[2] 36 & 37 Vict. c. 66, s. 75.

Section III

Courts of Inferior Jurisdiction

§ 1. *Civil Courts.*

Until 1846 justice in civil cases was, as a rule, only to be obtained at Westminster, or by means of an action begun at Westminster and tried under a commission of assize on circuit.

Local courts before 1846.

The ancient county court had ceased to exercise any jurisdiction. The local courts were either courts in chartered towns[1] with limited powers, or courts of request, bearing the old title of the Court of Requests at Whitehall, but existing by virtue of Statute, to meet the needs of suitors, in towns which were willing to pay for such a convenience.

The County Courts

In 1846 was passed the first County Court Act, whereby the country was divided into circuits to each of which was assigned a local Court of Record. This Court was intended to enable small debts to be recovered cheaply and by a uniform mode of procedure. They were limited in jurisdiction by the amount of the sum recoverable and the character of the action brought; they have, however, gradually acquired from Parliament an extended jurisdiction in both respects, and are now not so much a relief to the poor suitor as to the judges of the High Court. But into this matter we need not enter. The judges of the County Courts are appointed and may be dismissed by the Lord Chancellor, who may, with the rule committee of the judges, make rules for their procedure. An appeal lies from their

Except in Duchy of Lancaster.

[1] Such Courts of Record existing by virtue of special Acts were: The Mayor's Court of London; The Passage Court of Liverpool (see 56 & 57 Vict. c. 37); The Hundred Court of Record of Salford; The Chancellor's Court in the University of Oxford. Courts existed by charter in Bristol (the Tolzey and Pie Poudre Court), Derby, Exeter, Kingston upon Hull, Newark, Northampton, Norwich, Peterborough, Preston, Ramsey. There are twenty-eight others which do no business. Some have paid officers, in others the Recorder is also judge. See Parliamentary Paper [187] for 1888. Wilson, Practice of the Supreme Court [ed. 7], p. 121.

decision to the High Court of Justice, and the statutes respecting them have been consolidated by an Act of 1888[1]. Appeal from them to High Court.

§ 2. *Criminal Courts.*

The inferior criminal jurisdictions are those of the Justices of the Peace trying indictable offences at Quarter Sessions or exercising a summary jurisdiction.

Every county has its commission of the peace, but there are some exceptional cases. The three Ridings of Yorkshire and the three divisions of Lincolnshire have separate commissions, and there are, here and there, some '*liberties*' or excepted jurisdictions, corresponding to the '*peculiars*' of the ecclesiastical world. On this commission are placed all the judges of the Supreme Court, all the members of the Privy Council, and such persons as the King, acting through the Lord Chancellor, may choose either on the recommendation of the Lord Lieutenant or after inquiries made independently[2]. The Lord Lieutenant is, in practice, the Custos Rotulorum, the chief of the justices, and keeper of the records of the county. The Commissions of the Peace:

I have elsewhere spoken of the administrative functions of the justice of the peace. His judicial duties are twofold. At Quarter Sessions, held four times a year, the justices of the peace form a court to try indictable offences with a jury, and to hear, without a jury, appeals from justices sitting as courts of summary jurisdiction, and on matters of rating, licensing[3], and the administration of the Poor Law in the matter of pauper settlement[4]. The chairman, elected by the justices, takes the part of the judge at a criminal trial, but he is only the presiding officer and spokesman of the justices who form the court. the Justice of the Peace.

[1] 51 & 52 Vict. c. 43.

[2] The property qualification formerly necessary for a Justice of the Peace was abolished by 6 Ed. VII, c. 16.

[3] The Licensing Act, 1904, has taken from Quarter Sessions the appeal which lay to them in cases where a licence was refused for no reason of misconduct or faulty construction of premises, but because it was in excess of the requirements of the neighbourhood. Such matters are now dealt with by a licensing committee of justices, constituted under the provisions of the Act.

[4] 8 & 9 Will. III, c. 30.

The summary jurisdiction of magistrates rests entirely upon Statute, is exercised in petty sessional divisions, and must be exercised by two justices sitting together [1].

It may explain what has just been said if I deal parenthetically and briefly with the person tried and his possible offence.

Certain offences can, and others cannot, be summarily punished.

Procedure in criminal cases.

A man may commit or be suspected of having committed an offence that cannot be summarily punished. A single justice of the peace may then, after a preliminary examination, take such steps as will ensure that he is at hand when wanted for trial. This is done by commitment to prison or by taking bail for his appearance. An indictment is then framed. The offence may be triable at Quarter Sessions or it may be of a class reserved for a judge of the High Court sitting on Commission. In either case a grand jury is charged by the presiding judge, and finds whether or no the indictment is a true bill. If it finds in the affirmative the prisoner is arraigned, tried, and found guilty or not guilty on the verdict of a petty jury.

By what courts triable.

Thus there are certain offences which may be tried by summary jurisdiction, by two justices sitting without a jury at petty sessions. Others cannot be so tried, but may be tried at Quarter Sessions with a jury. Others again can only be tried by a Commissioner on circuit or judge of the High Court. And there is yet another class of indictable offences, where the prisoner is given an option, whether he will be summarily tried by justices sitting at petty sessions, or committed for trial at Quarter Sessions or Assizes.

Appeals.

But as regards the connexion of inferior and central jurisdiction in criminal cases it is enough to say that an appeal by way of re-hearing lies under certain circumstances from a Court of summary jurisdiction to Quarter Sessions, and that in all cases of conviction after indictment the prisoner may exercise the rights conferred by the Criminal Appeal Act; while in matters of rating and

[1] See Summary Jurisdiction Act (1879), 42 & 43 Vict. c. 49.

licensing the dissatisfied party may demand a statement of a case by justices for the decision of the High Court.

Intervention of High Court.

These forms of appeal are statutory, as is also the right to demand of justices at Quarter Sessions the statement of a case for the decision of the High Court[1]. But the High Court may be moved directly by application for a writ of *certiorari* to quash orders in which justices had no jurisdiction or for a writ of *mandamus* to compel justices to discharge a duty cast upon them.

The borough magistracy.

The borough magistracy must be distinguished from that of the County. Some boroughs have no Commission of the Peace. Then they fall under the jurisdiction of the shire. Some have a Commission of the Peace but no Quarter Sessions. Their justices then can only exercise a summary jurisdiction. Some have a Court of Quarter Sessions, but here the borough justices do not, as in the County, act as judges: the King appoints, and the borough pays a Recorder, a barrister of not less than five years' standing, who with the jury of the borough tries such cases as are not reserved for the superior Courts.

The Recorder.

The Stipendiary magistracy.

The Stipendiary magistracy is an institution which took its rise in the metropolis, where a number of jurisdictions converged. The City of London, the City of Westminster, the Liberty of the Tower, each had a separate Commission of the Peace, while most of the vast aggregate of houses would fall under commissions for Kent, Middlesex, Surrey, and Essex.

in the Metropolis.

To meet the difficulty a series of Acts has constituted a body of paid magistrates, each of whom is in the Commission of the Peace for the four counties named, for Hertfordshire, Westminster, and the Liberty of the Tower. They are twenty-three in number, sitting in thirteen courts. They do not sit together, but each has the power of two justices where two are needed for any judicial act.

[1] The appeal from the Court of Summary Jurisdiction to Quarter Sessions is an appeal on the merits of the case as well as on questions of law. But the statement of a case for the High Court, whether by justices at Petty Sessions or at Quarter Sessions, must be a statement of a question of law.

The Assistant Judge.

For the Administrative County of London Quarter Sessions are held twice a month, and the County Bench is presided over by a paid assistant judge.

Local stipendiaries;

Other towns have stipendiary magistrates with like powers, but unlike the London police magistrates, who are paid partly by the County of Middlesex, partly by the nation, the local stipendiary is paid by the locality.

their appointment.

All alike are appointed by the Crown on the advice of the Home Secretary, and hold office so long as the King is pleased to retain them in the Commission of the Peace.

Section IV

Courts outside the Supreme Court

There are Courts which do not form part of the Supreme Court, nor does Appeal lie from them to that Court.

But all, save two, are drawn together into one or other of the great Courts of Final Appeal. The two exceptions are the Court of the Lord High Steward and Courts-Martial.

§ 1. *Anomalous Criminal Jurisdictions.*

The Court of the High Steward: during recess,

A peer is entitled to be tried by his peers, if indicted for treason, felony or *misprision*, that is, deliberate concealment of treason or felony. If the trial takes place out of session it takes place 'before the King in Parliament,' in the Court of the Lord High Steward[1]. A peer is appointed to this office *pro hac vice* by the Crown, by letters patent under the Great Seal, with commission to try the offence. The Lord High Steward is then required by 7 Will. III, c. 3, to summon all peers who have a right to sit and vote, twenty days before the trial. He presides and determines finally any legal questions that may arise, but the judges may be summoned to assist the Court with their advice, if required. The verdict of the majority (so as it be twelve in number in case of a conviction) decides the issue.

during session.

If Parliament is sitting a Lord High Steward is appointed in like manner, but he is then only a presiding officer,

[1] I have not attempted to touch the interesting historical questions which concern the origin of this Court. They are fully discussed in the learned work of Mr. Vernon Harcourt, 'His Grace the Steward and the Trial of Peers'.

standing in relation to the other peers as the chairman of Quarter Sessions to the other justices of his Bench.

This Court seems to stand in no relation to the other Courts of law, except in so far as the indictment is found in an ordinary Court, and the accused peer may there plead a pardon. The indictment is moved by writ of *certiorari* into the Lords' House[1].

Courts-Martial are also avowedly outside the ordinary course of law. But they are so far subject to the Supreme Court that they can be kept within the bounds of their limited jurisdiction by writ of *prohibition*: are liable to have a matter removed from their cognizance by writ of *certiorari*, if it be one in which they intrude on the jurisdiction of the High Court: may be required by writ of *habeas corpus* to set free a person improperly detained in custody: may find their members made liable to actions for damages if they act in excess of their jurisdiction to the injury of another. Courts-Martial.

But the Courts-Martial are exceptional Courts permitted every year for a year by the Army Act. While they act within their jurisdiction no appeal lies save to the superior authority, who by Statute has power to confirm the sentence or send it back for revision[2].

§ 2. *Ecclesiastical Courts.*

The Ecclesiastical Courts stand in a different relation to the Supreme Court and the Court of Final Appeal. They too are liable to restraint upon excess of jurisdiction by writ of prohibition, but for the purpose of giving effect to their sentences they must have recourse to the procedure of the High Court, and they lead up to the final Court of Appeal in the Judicial Committee of the Privy Council. I will not deal with the history of the Ecclesiastical Courts from the time that the Conqueror severed them from the secular Courts. It will perhaps be sufficient to note the jurisdic- Their connexion with central judicature.

[1] The last instance of a trial in the Court of the Lord High Steward was the trial of Earl Russell for bigamy on the 18th of July, 1901. The proceedings are reported [1901] A. C. p. 446. The trial took place in the Royal Gallery, Parliament being in Session, and on this occasion all the Lords of Appeal and eleven of the judges were in attendance.

[2] 44 & 45 Vict. c. 58, s. 54.

tion which they exercised in 1832, as being in point of power, though not perhaps in point of use, their mediaeval jurisdiction; and then to note the changes which have since taken place.

Their powers in 1832,

'The Ecclesiastical Jurisdiction,' so ran the report of the Ecclesiastical Courts Commission of 1832, 'comprehends causes of a civil and temporal nature; some partaking both of a spiritual and civil character; and, lastly, some purely spiritual.

in temporal,

'In the first class are testamentary causes. Matrimonial causes for separation and for nullity of marriage which are purely questions of *civil* right between individuals in their lay character, and are neither spiritual nor affecting the Church establishment.

mixed,

'The second class comprises causes of a *mixed* description, as suits for Tithes, Church Rates, Seats, and Faculties.

and spiritual causes.

'The third class includes Church discipline and the correction of offences of a *spiritual* kind. They are proceeded upon in the way of *criminal* suits *pro salute animae*, and for the lawful correction of manners. Among these are offences committed by the Clergy themselves, as neglect of duty, immoral conduct, advancing doctrines not conformable to the Articles of the Church, suffering dilapidations and the like offences: also by Laymen, such as brawling, laying violent hands and other irreverent conduct in the church or churchyard, violating churchyards, neglecting to repair ecclesiastical buildings, incest, incontinence, defamation; all these are termed causes of correction, except defamation which is of an anomalous character.

'These offences are punished by monition, penance, excommunication, suspension *ab ingressu ecclesiae*, suspension from office, and deprivation[1].'

Changes since 1832.

The reduction of these topics has been considerable since 1832. Testamentary and matrimonial causes were removed to the Courts constituted by 20 and 21 Vict. cc. 77–85, and are now dealt with in the Probate, Divorce, and Admiralty Division. Suits for defamation were abolished by 18 & 19 Vict. c. 41; proceedings against laymen for brawling by 23 & 24 Vict. c. 32; church rates have ceased to be com-

[1] Report of Ecclesiastical Courts Commission, 1832, set out in Historical Appendix to the Ecclesiastical Courts Commission, 1883, vol. i, p. 193.

pulsory; tithe has been commuted for a rent-charge; liability for dilapidations depends on an order to be made by a bishop; and jurisdiction in cases of perjury has been inferentially removed to the temporal courts [1].

But we will now go to the Courts by which this jurisdiction is administered.

The Archdeacon's Court.

The Court of the Archdeacon is the lowest in the scale of the Ecclesiastical Courts. In jurisdiction it would seem to be competent to deal with all such cases as might go before the Bishop's Court, but in practice the cases in which the Archdeacon's Court has been called upon to exercise its functions are rare in modern times [2]. The judicial powers of the archdeacon seem to be exercised in a summary way over matters connected with repairs of church buildings in his archdeaconry. These he may visit every year, and must visit once in three years.

The Bishop's Court.

The Court of the Bishop or Consistory Court is next in order of the Courts Christian, or Ecclesiastical Courts.

As to this Court we must note two things, of which the first is the mode in which justice is there administered.

When the business of the spiritual courts grew, as it did rapidly after the Conquest, the bishops found that the judicial business cast on them was greater than they had time to transact. Hence the Courts of the archdeacons began to acquire more business and jurisdiction than was consistent with the authority of the bishop.

Delegation of functions,

So the bishops delegated their judicial work to professional lawyers, their officials, chancellors, commissaries, or vicars-general. Such an officer was first appointed to hold at the pleasure, or for the life, of the bishop, then he came to hold for his own life, and in the last century it became the practice to make the appointment by letters patent under the seal of the diocese.

The Dean and Chapter in most dioceses ratify the appointment of the Chancellor or Vicar-General [3], and the

[1] *Phillimore* v. *Machon*, L. R., 1 P. D. 481.

[2] Phillimore, Ecclesiastical Law (ed. 2), 197 200.

[3] The Vicar-General seems to be the exponent of the more especially spiritual jurisdiction of the bishop. The Chancellor of the Diocese is

beyond resumption.

bishop is thus excluded from resuming a power once delegated; but in some dioceses the bishop reserves certain matters to be dealt with by himself[1].

The second point to note is the effect of Statutes of the present reign upon the jurisdiction of the bishop.

The Church Discipline Act;

The Church Discipline Act, 1840[2], provides a mode of dealing with offences, by persons in orders, against the laws ecclesiastical, or with scandal or report attributing such offences.

its requirements of procedure,

The bishop in whose diocese the offence is alleged to have been committed may appoint a commission of five, of whom one must be his vicar-general, or an archdeacon or rural dean of the diocese. They may inquire, take evidence on oath, and report to the bishop. If there is found to be a *primâ facie* case, the matter passes into the hands of the bishop in whose diocese the accused clerk is beneficed, wherever the offence may have been committed. The bishop may, before the commission has sat or reported, deal with the matter with the consent of the accused; or he may after report try the case himself with three assessors, or he may send the case by letters of request to the court of the province, that is, to the Archbishop's Court.

and its effect.

The Act has affected the jurisdiction of the bishop in more ways than one. Directly, it supersedes all other modes of trying clerks for ecclesiastical offences, and requires the bishop to try the case in person, thus limiting his power of acting through a vicar-general or commissary. Indirectly, by giving power to send such cases to the

described in patents as 'Vicar-General in spirituals and principal official.' It appears from evidence given before the Ecclesiastical Courts Commission (Report, vol. ii, p. 83) that the Vicar-General exercised the bishop's jurisdiction over the clergy, while the principal official dealt with contentious cases and those of a temporal character.

In the case of bishops the offices are held by the same person; but the principal official and Vicar-General of an Archbishop are two different persons, and in the Court of Audience the Vicar-General represents the Archbishop.

[1] See the *patents* of the officials principal, &c. of the provinces and dioceses of England and Wales, Eccl. Courts Commission, vol. ii, pp. 659–98.

[2] 3 & 4 Vict. c. 86.

provincial court, it has suggested the constant use of such a power, and so has brought into disuse the diocesan jurisdiction over such offenders.

The Clergy Discipline Act of 1892[1] enables the bishop to treat a preferment as void where a beneficed clergyman has been convicted on indictment, or who has been shown to have been guilty of immoral conduct by the result of legal proceedings under conditions specified in the Act. He is also empowered to appoint a tribunal, chosen in a prescribed manner, to try a clergyman on charges of immorality or offence against laws ecclesiastical, and subject to an appeal to the King in Council, to sentence him, if found guilty, to suspension or deprivation, with incapacity to hold preferment.

The Public Worship Act.

The Public Worship Act, 1874[2], creates a procedure for offences against the ceremonial law of the Church: enabling the archdeacon of the archdeaconry, the churchwarden, or three parishioners of the parish, wherein the alleged offence has taken place, to make a representation to the bishop. The bishop may hold that no proceedings should be taken, or he may, if both parties will accept his decision without appeal, hear and decide the case. Otherwise it must be transmitted to the court of the province: with this we have now to deal.

The Courts of the Province of Canterbury,

The Provincial Court is the Court of the Archbishop of the province. In the province of Canterbury until 1857 there were four such courts.

of the official Principal,

(*a*) The court of the official principal of the Archbishop decided cases on appeal from the diocesan courts; and cases of first instance either because sent by letters of request, or, before the Reformation, in virtue of the legatine authority of the Archbishop.

The official principal was the Dean of Arches, so called because he held his court in Bow Church (Sancta Maria de Arcubus), thus taking the title of a subordinate judge whose office he absorbed.

of the peculiars,

(*b*) The original Court of Arches, dealing with cases arising in the thirteen parishes of London which were

[1] 55 & 56 Vict. c. 32.

[2] 37 & 38 Vict. c. 85.

exempt from the jurisdiction of the Bishop of London and were 'peculiars' of the Archbishop.

of personal jurisdiction,

(*c*) The Court of Audience, which dealt with matters reserved by the Archbishop for his personal jurisdiction[1]. These he decided for himself with the aid of assessors, or, if his vicar-general acted as judge, he acted not in his own name but in that of the Archbishop.

of civil jurisdiction,

(*d*) The Prerogative Court, which exercised the testamentary and matrimonial jurisdiction vested in the Church Courts. Most of the business thence arising was done in the Provincial Courts, though the diocesan courts could deal with such cases. This jurisdiction was taken away in 1857, and conferred on the newly-constituted Probate and Divorce Courts.

of York.

The Courts of the Province of York were the Chancery Court, and, before 1857, the Prerogative Court; the former exercising the appellate and original jurisdiction in ecclesiastical matters.

The officials principal.

The mode of appointment of the officials principal of the two provincial courts has been altered by the Public Worship Act of 1874. Before that Act each Archbishop made his appointment by letters patent under the archiepiscopal seal, the person designated having previously subscribed to the Thirty-nine Articles.

The Act of 1874 provided that the judge created for the purposes of the Act should be appointed by the two archbishops, but that their appointment needed confirmation by the sign manual warrant of the Queen; and further that the judge so constituted should, as the places of officials principal in each province became vacant, enter upon those offices *ex officio*.

Thus the appointment of their officials principal by the two archbishops is made subject to the approval of the Crown.

[1] It is presumably in the Court of Audience that the Archbishop sits as a judge of first instance to try a suffragan bishop of the province. For though Archbishop Benson, in the judgment in which he decided in favour of his jurisdiction in the case of *Read* v. *The Bishop of Lincoln*, speaks of the Court of Audience as distinct from the Court in which he then presided, it is not easy to see what other provincial court would be appropriate. Roscoe, Bishop of Lincoln's Case, 33.

Here we must leave the Ecclesiastical Courts till we take them up again in dealing with the Court of Final Appeal.

I must pass briefly over the courts in Scotland, Ireland, and the Colonies. I have touched elsewhere upon those of the Channel Islands and the Isle of Man.

§ 3. *Courts of Scotland.*

The Court of Session.

The Scotch Court of Session corresponds in Scotland to the Supreme Court of Judicature in England. It is the highest civil tribunal, and the jurisdictions of other Scotch Courts, though not so completely merged in it as are similar English jurisdictions in that of the Supreme Court, have come to be exercised by its members.

The Court consists of a Lord President, a Lord Justice Clerk, and eleven Lords Ordinary. It is divided into an Outer and an Inner House. The Inner House sits in two divisions of four judges, the Lord President in one, the Lord Justice Clerk in the other. The Outer House consists of five judges sitting singly; its jurisdiction is subordinate to that of the Inner House.

It should be noted that in Scotland the distinction between law and equity, which has been so marked a feature in the history of English law, has never existed, and that the jury to determine questions of fact in civil cases is a modern institution derived from England, and consists of a body of twelve. The jury in criminal cases is a part of the ancient procedure, and consists of a body of fifteen.

There are now absorbed into or associated with the Court of Session the following courts:—

The Jury Court.

The Jury Court, which from 1815 to 1830[1] determined disputed questions of fact remitted to it from the Court of Session: it is now a department of the Court of Session for this purpose.

The Exchequer.

The Court of Exchequer, constituted at the time of the Union as a revenue court, from which error lay direct to the House of Lords: it is now[2] wholly merged in the Court of Session.

The Court of Teinds.

The Court of Teinds deals with the tithe of parishes

[1] 11 Geo. IV, & 1 Will. IV, c. 69.

[2] 19 & 20 Vict. c. 56.

throughout Scotland. Its functions are partly administrative, corresponding to those of the Ecclesiastical Commissioners in England, partly judicial, being concerned with the valuation of the tithe and the enforcement of payment. Its judges are the judges of the Court of Session, and its decrees are enforced by the process of the Court of Session, but it remains a separate court with a separate official staff.

The Court of Admiralty.

The Court of Admiralty was a distinct court with a civil and criminal jurisdiction until 1830, when its civil jurisdiction was assigned to the Court of Session, its jurisdiction in matters of prize to the English Court of Admiralty and its criminal jurisdiction to the Court of Justiciary.

The Court of Justiciary.

The Supreme Criminal Court in Scotland is the High Court of Justiciary, of which the Lord Justice General is President. This office is now united with that of the Lord President of the Court of Session, in whose absence the Lord Justice Clerk presides, while five Lords of Session are Lords Commissioners of Justiciary.

They sit singly, with a jury of fifteen, to try criminal cases, and in a court of two or more to review the decisions of inferior courts: from their decision there is no appeal.

Circuits are held twice a year for civil as well as for criminal cases, for which purpose Scotland is divided into three districts.

Inferior Courts.

The principal of the inferior courts of Scotland is that of the sheriff, which enjoys a civil and criminal jurisdiction corresponding somewhat to that of the county court and the Court of Quarter Sessions in England.

The sheriffs, like the Lords of Session, are appointed by the Crown, and hold office during good behaviour, or *ad vitam aut culpam* [1].

§ 4. *Irish, Indian, and Colonial Courts.*

Irish Courts.

With the Irish Courts, their points of resemblance and difference from the English Courts, I do not propose to deal.

[1] For an account of Justices of the Peace and other inferior Courts in Scotland I must refer the reader to Lorimer's Handbook of the Law of Scotland, pp. 485–505; and Green, Encyclopaedia of Scots Law, vol. vii, p. 265; vol. xi, p. 305.

The superior courts fall under a Judicature Act passed for Ireland in 1877 [1]. The points of resemblance so far exceed the points of difference in the superior courts, and the inferior courts would take so much more space to describe than is proportionate to the scope of this work, that I am compelled to let them pass.

Indian. The superior courts in India are the creation of the Indian High Courts Act of 1861 [2]. This Act enables the King to establish, by letters patent under the Great Seal, High Courts of Judicature for Bengal, Madras, and Bombay, and also, if he so please, for the North-West Provinces. Upon these courts may be conferred such jurisdiction, civil, criminal, Admiralty and Vice-Admiralty, testamentary, intestate and matrimonial, original and appellate, as the King may from time to time by letters patent direct.

Colonial. The Colonial Courts are constituted (1) by the Crown either in virtue of its prerogative, or under statutory powers such as were conferred by the British Settlements Act, and similar Acts in the case of individual colonies; or (2) in the case of colonies with legislative institutions, under the Colonial Laws Act of 1865, 28 & 29 Vict. c. 63, s. 5:—

'Every Colonial Legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every Representative Legislature shall, in respect to the Colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such Legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the time being in force in the said Colony.'

Vice-Admiralty Courts. Admiralty Courts in the colonies have had a different history to others. Admiralty jurisdiction existed to deal with matters arising at sea, outside the purview of other

[1] 40 & 41 Vict. c. 57.

[2] 24 & 25 Vict. c. 104, and see Ilbert, Government of India, pp. 126–8.

courts. So the creation of Vice-Admiralty Courts in the colonies was not the establishment of a new jurisdiction, but of machinery for giving effect to one already existing.

Acts of 1863 and 1867[1] gave facilities for establishing such courts in all the colonies by instrument under the seal of the Admiralty, and these Vice-Admiralty Courts were emanations of the Admiralty Court at home. But in 1890[2] these imperial courts, existing side by side with the colonial courts, were abolished, and their duties and powers transferred, or the colonial legislatures were empowered to transfer them, to the colonial courts.

Section V

The Courts of Final Appeal

The last resort of the suitor is to the Crown in Parliament or to the Crown in Council. To use more familiar terms, the final Courts of Appeal are the House of Lords and the Judicial Committee of the Privy Council.

I have noted the exceptional cases in which the decisions of the Court of Criminal Appeal are liable to review by the House of Lords, and the exceptional character of the criminal jurisdiction of the Court of the Lord High Steward and of the Courts-Martial. We may, therefore, consider that criminal law is excluded from this section unless specially named.

It remains to consider how the Courts with which we have dealt are grouped respectively under the House of Lords and the Judicial Committee of the Privy Council.

§ 1. *The House of Lords.*

The Appellate Jurisdiction Act.

The jurisdiction of the House of Lords rests now upon the Appellate Jurisdiction Act, 1876, of which the third section enacts that, subject to certain provisions in the Act, an appeal shall lie to the House of Lords from any order or judgment of any of the Courts following:—

'(1) Of Her Majesty's Court of Appeal in England; and (2) of any Court in Scotland from which error or an appeal at

[1] 26 & 27 Vict. c. 24, 30 & 31 Vict. c. 45. [2] 53 & 54 Vict. c. 27.

or immediately before the commencement of this Act lay to the House of Lords by common law and by statute; and (3) of any Court in Ireland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords at common law or by statute.'

English appeals.

I have written elsewhere of the process by which the House of Lords became a Court of error from the English courts of common law, and a Court of Appeal from the English courts of equity. It is enough, therefore, to say here that, with few exceptions[1], every litigant may obtain a review of any order or judgment of the High Court of Justice in the Court of Appeal: and that from this last a final appeal may be brought by way of petition to the House of Lords.

The suitor prays for a review of the order or judgment appealed against and that 'the order may be reversed, varied or altered, or that the petitioner may have such other relief in the premises *as to His Majesty the King in His High Court of Parliament may seem meet.*'

Error on the record, as distinct from appeal, is abolished.

Scotch appeals.

The Scotch Courts from which before the Act of Union an appeal lay to the Parliament of Scotland were the Courts of Session and of Teinds. No provision was made by the Act of Union for an appeal to the British House of Lords, but the jurisdiction of the House appears to have been accepted without controversy[2]. Provision was made for error and appeal from the Scotch Court of Exchequer constituted by 6 Anne, c. 26, s. 9.

Practically Scotch Appeals came to the House of Lords from the Inner House of Session[3], and the Act of 1876 has merely given statutory affirmation to existing practice.

Irish appeals.

As regards the appellate jurisdiction of the Irish House of Lords before 1720 there has been some controversy, into which I will not enter[4].

[1] See, as to these, Wilson, Judicature Acts, ed. 7, p. 435.

[2] MacQueen, Appellate Jurisdiction of House of Lords and Privy Council, 286-8.

[3] Report of Committee of House of Lords on Appellate Jurisdiction, p. 69. Parl. Papers, 1872 [325].

[4] As to the case of *Annesley* v. *Sherlock*, and the precedents collected as

History. The Declaratory Act of 1720 denied and took away the jurisdiction of the Irish House of Lords. The repeal of this Act in 1872 and the passing of the Act of Renunciation in 1783 restored and reaffirmed it.

The Act of Union in 1800 provided that—

'all writs of error and appeals depending at the Union or hereafter to be brought, shall from and after the Union be decided by the House of Lords of the United Kingdom.'

Present practice. Such was the state of things to which the Appellate Jurisdiction Act applied. Since then the Supreme Court of Judicature Act for Ireland (1877) has constituted a High Court and a Court of Appeal for Ireland similar to those of England, and has provided for an appeal from the latter Court to the House of Lords in all cases in which an appeal would have lain either to the King in Council or to the House of Lords from the Courts which were fused in the Irish Supreme Court.

With the composition of the Court of the House of Lords I will deal later.

§ 2. *The King in Council.*

Appeals to Council. The Appeal to the King in Council is not so simple of explanation as the appeal to the King in Parliament or House of Lords.

When the Long Parliament dissolved the Court of Star Chamber and restrained the jurisdiction of the Council, all powers which by any Statute were conferred upon the Star Chamber, or all or any of its judges, were taken away, and the Council was forbidden to deal, as it had dealt, with matters cognizable by the Courts of Common Law.

But the King in Council was still the resort of the suitor who could not obtain justice in any of the dependencies of the Crown, and the Act which took away the original jurisdiction of the King in Council at home did not touch petitions from the adjacent islands or the plantations.

to the jurisdiction of the English House of Lords, see MacQueen, p. 92, and Appendix v, pp. 787-91. For another view of the matter see Lecky, History of England, i. 419.

Their history.

From the very beginning of the fourteenth century receivers and triers of petitions had been appointed to aid the dispensation of justice in Parliament. Of these there were two groups, one for Great Britain and Ireland, one for Gascony, the lands beyond the sea, and the isles. Their functions seem to have been distinct from those of the House of Lords as a Court of Error, and though they continued to be appointed at the commencement of each Parliament until the summer of 1886, their office fell early into abeyance. For the lapse of time which intervened between sessions of Parliament after the middle of the fifteenth century bore hardly on the petitioner from beyond sea: and if he appealed to the King in Council instead of to the King in Parliament, his case was heard by the same persons (for the triers of petitions were members of the Council), and was dealt with more promptly.

Appeals from the Channel Islands.

The Channel Islands were the first applicants for justice in this form, and appeals from Jersey were granted in the reign of Henry VIII[1]. Thenceforth the islands used this Court freely, by way of regular appeal from decisions which the suitor disputed as wrongly given, or by way of *Doleance* for an alleged denial of justice.

From the plantations.

The plantations were the next applicants. In 1661 a standing committee was appointed to hear appeals, and *doleances* from the Channel Islands, and in 1667 this duty was assigned, together with the hearing of appeals from the plantations, to the Committee for Trade and Plantations. In 1687 this Committee was made an open Committee of the whole Council, and in 1696 an Order was made that appeals were to be heard by a Committee of all the Lords or any three of them.

From the Isle of Man.

In 1716 an inhabitant of the Isle of Man appealed against a decree of Lord Derby, the feudal lord of the island, and the Council heard him on the ground, stated by Lord Chief Justice Parker, that the King in Council must needs have a jurisdiction in such a case to prevent a failure of justice[2].

Thus one may say that down to the year 1833 all the

[1] MacQueen, 686.

[2] *Christian* v. *Corren*, Peere Williams, i. 329.

petitions 'des autres terres et pays de par la mer et les isles' were dealt with by an open Committee of the Privy Council, which advised the Crown as to the Order to be made in each case.

In lunacy.

But in addition to these, the Council heard and determined matters relating to the custody of the person and property of lunatics. For the House of Lords had declined to deal with such cases, holding that the matter was one of royal prerogative entrusted by the King to the Chancellor[1].

Ecclesiastical and admiralty.

Besides these matters there was transferred to the Privy Council in 1832 the jurisdiction of the Court of Delegates in ecclesiastical and admiralty appeals.

It will be remembered that 25 Henry VIII, c. 19[2], gave to the subject a right of appeal, for lack of justice in any of the courts of the archbishops of the realm, to the King in Chancery, who thereupon appointed delegates with a commission under the great seal to review and finally determine the matter in issue.

A similar court was provided by statute for admiralty appeals in the reign of Elizabeth[3].

In 1832 this form of appeal was taken away and the parties to admiralty and ecclesiastical appeals were referred for redress to the Crown in Council[4].

The Judicial Committee.

In 1833 was constituted the Judicial Committee of the Privy Council[5]. With the composition of this body I will deal presently. Its jurisdiction is our present concern. To it were referred—

Its jurisdiction.

(1) All appeals or complaints in the nature of appeals made to the Crown in Council (§ 3).

(2) All matters which, arising in Admiralty or Vice-Admiralty courts in the dominions of the Crown, might heretofore have been taken by way of appeal to the Court of Admiralty (§ 2).

[1] Peere Williams, iii. 108, and note.

[2] The Act for the Submission of the Clergy; see p. 224 supra.

[3] 8 Eliz. c. 5. The Act for the Submission of the Clergy refers to the procedure in Admiralty appeals as that to which ecclesiastical appeals should be made to conform. So it would seem that the Act of Elizabeth gave statutory force to existing practice.

[4] 2 & 3 Will. IV, c. 92, s. 3.

[5] 3 & 4 Will. IV, c. 41.

The Judicature Acts (which merged the English and Irish Courts of Admiralty in the Supreme Courts of the two countries) and the Appellate Jurisdiction Act transferred Admiralty appeals to the House of Lords. But the Vice-Admiralty Courts do not seem to have been thus affected. They are now merged in the Colonial Courts, whence appeals may lie under certain conditions to the Crown in Council.

In character,

(3) Any such other matter as the Crown may choose to refer to the Judicial Committee for hearing or consideration (§ 4).

The Act proceeds to confer upon the Judicial Committee various powers needed for the working of a court, as to taking evidence, enforcement of attendance of witnesses, and the carrying into effect of its orders. Rules of procedure have been made by Orders in Council from time to time, and the amount in issue which makes an appeal permissible from the Indian and Colonial Courts has been fixed by such orders, by royal instructions or by acts of colonial legislatures.

But the clause which enables the Crown to refer to the Judicial Committee such matters as it thinks fit ensures the right of the subject to appeal against any miscarriage of justice, and maintains the prerogative of the King to correct such miscarriage.

The Dominion of Canada and the Commonwealth of Australia have limited in certain directions this right of appeal. The Canadian Statute, 35 Vict. c. 11, s. 47, and s. 73 of the Commonwealth of Australia Constitution Act [1], provide that the judgments of the Supreme Court of Canada and of the High Court of Australia should be final, but without prejudice to the right of the Crown to grant special leave to appeal. The Judicial Committee has in a series of cases formulated the grounds on which they will advise the Crown to grant this leave [2].

[1] 63 & 64 Vict. c. 12.

[2] These grounds may be generally stated; the matter must be one of public interest, or involving important questions of law, or property of a considerable amount. *Daily Telegraph Co.* v. *M^cLaughlin* [1904], A. C. 779, and

But the Commonwealth Act imposes a further restriction, and forbids any appeal on any question, however arising, which was a matter of Federal jurisdiction and related to the constitutional powers of the Commonwealth and States or of State and State *inter se*.

The Judiciary Act of 1903 of the Commonwealth Parliament invested the Courts of the States with a Federal jurisdiction in certain cases, and enacted that in these cases the only appeal should be to the High Court of Australia.

The limitations thus imposed on the right of appeal to the King in Council have come before the Judicial Committee for consideration, and it has been held that the Commonwealth could not make a matter one of Federal jurisdiction which was within the jurisdiction of the State Courts when the Commonwealth Act was passed. In other words, what was a matter of independent State jurisdiction, such as the imposition of taxation by a State legislature on those who were within its authority, could not be treated as a question of the powers of Commonwealth and States, or State and State *inter se*: it was not therefore a subject of Federal jurisdiction, and no legislation of the Commonwealth Parliament could make it so [1].

In extent.

Thus again, the act of a colonial legislature by which the decision of a Colonial Court in matters of insolvency was made final was held not to preclude the exercise of the prerogative in allowing an appeal as a matter of grace [2].

Apart from limitations imposed by Statute which have received the assent of the Crown in Council or the Crown in Parliament, the King may, by virtue of the prerogative, review the decisions of Colonial Courts civil and criminal [3], and of Courts created under treaty with a foreign power exercising jurisdiction in a foreign country [4].

In virtue of this prerogative the Crown has been advised to receive an appeal against the decision of a police magis-

see *Prince* v. *Gagnon* (1882), 8 App. Ca. 103; *Wilfley Ore Syndicate* v. *Guttridge* [1906], A. C. 548; *N. S. Wales Taxation Comm.* v. *Baxter* [1908], A. C. 216.

[1] *Webb* v. *Outrim* [1907], A. C. 81.

[2] *Cushing* v. *Dupuy*, 5 App. Ca. 409 (1880). [3] 1 Moore, P. C., N. S. 312.

[4] *Hart* v. *Gumpach*, L. R., 4 P. C. 439, an appeal from the Supreme Court of China and Japan, created under the treaty of Tientsin.

trate in the Falkland Islands[1]: and again, against a decision of the Supreme Court of New South Wales granting a new trial in a case of felony[2]; but the mischief which might arise from allowing an appeal in criminal cases was adverted to in the cases just cited.

No such difficulty arose in the case of *ex parte Marais*, which was argued on a petition for special leave to appeal from a decision of the Supreme Court of the Cape Colony. The case raised the question whether, in a colony where a state of war prevailed and martial law was proclaimed in certain districts, a British subject arrested and imprisoned under martial law could claim to have his case heard by the Civil Courts, which were at the time open, but refused to entertain his complaint. The Judicial Committee advised the Crown that leave to appeal should not be given[3], but the case illustrates the nature of the remedies afforded by the jurisdiction of the Crown in Council, for the question at issue was whether the Crown in Council should remit to the Courts of a Colony, for hearing, a case which they assumed that they could not entertain.

And conversely appeal may be made to the King in Council to declare the nullity of an assumed jurisdiction in the exercise of which a subject asserts that he has been wronged. Such was the case of Bishop Colenso in 1864[4].

§ 3. *The Composition and action of the Courts.*

The House of Lords.

In the House of Lords no appeal may be heard unless there are present not less than three persons who fall under the designation, given in the Act, of *Lords of Appeal*.

A Lord of Appeal may be (1) the Chancellor of Great Britain for the time being, (2) a Lord of Appeal in Ordinary, (3) a Peer of Parliament who has held high judicial office.

[1] *The Falkland Islands* v. *The Queen*, 1 Moore, P. C., N. S. 299 (1863).

[2] *R.* v. *Bertrand*, L. R., 1 P. C. 520 (1867).

[3] *ex parte Marais* [1902], A. C. 109. It is impossible to read this decision without a regret that opportunity was not given for a fuller argument and consideration of a case in which the refusal of the Committee to advise an interference with the action of the Civil Courts of Cape Colony might have been put on more conclusive grounds.

[4] *In re the Bishop of Natal*, 3 Moore, P. C., N. S. 115 (1864).

Lords of Appeal in Ordinary.

A Lord of Appeal in Ordinary is appointed by letters patent, he is entitled to a writ of summons to attend and to sit and vote in the House of Lords[1], he enjoys the dignity of a baron *for life*, an emolument of £6,000 a year, and holds office during good behaviour subject to removal on address by both Houses of Parliament. The number is limited to four, and they must be qualified by fifteen years' practice at the Bar, or two years' tenure of high judicial office.

High judicial office.

'High judicial office' means 'the office of Lord Chancellor of Great Britain or Ireland, of a paid judge of the Judicial Committee of the Privy Council[2], or a judge of one of His Majesty's superior Courts of Great Britain or Ireland.'

The Judicial Committee.

The composition of the Judicial Committee has been altered from time to time. It now consists of the Lord President, such members of the Privy Council as hold, or have held, 'high judicial office[3],' the Lords Justices of Appeal[4], and two other persons being Privy Councillors, whom the King may appoint by sign manual warrant[5]. Besides these there may be one or two paid members, who have held the office of judge in the East Indies. They were intended by the Act of Will. IV to be assessors only, but are now to be, for all purposes, members of the Committee[6]. The Church Discipline Act provided that on ecclesiastical appeals under that Act such archbishops and bishops as were Privy Councillors should be members of the Committee, but the Appellate Jurisdiction Act has reduced them to the position of Assessors[7]. It is necessary that four members should be present at the hearing of a cause; and no member may attend unsummoned.

[1] Until 1887 a Lord of Appeal when he ceased to exercise judicial functions lost his right to sit and vote. This has been corrected by 50 & 51 Vict. c. 70, s. 2.

[2] 39 & 40 Vict. c. 59, s. 25. This office, created by 34 & 35 Vict. c. 91, no longer exists. These members of the Judicial Committee have died and their places are supplied by the Lords of Appeal.

[3] 50 & 51 Vict. c. 70, s. 3.

[4] 44 & 45 Vict. c. 3.

[5] 3 & 4 Will. IV, c. 41, s. 1.

[6] Ibid., s. 1, and 50 & 51 Vict. c. 70, s. 4.

[7] 3 & 4 Vict. c. 86, s. 15, and 39 & 40 Vict. c. 59, s. 14.

Their judgments.

The mode in which the two Courts give their decisions indicates their characters as representing the Crown in Parliament and the Crown in Council. The House of Lords gives judgment, after hearing counsel, as part of the business of the House. A sitting of the House of Lords in its appellate capacity is a sitting of the House. The members of the House who take part in the decision move the House in turn that the appeal be allowed or dismissed, and that it be *ordered and adjudged* accordingly: the order and judgment are entered on the journals of the House.

The Lords move the House.

The Judicial Committee advise the King.

A judgment of the Judicial Committee is a statement at length of the reasons[1] which determine them in 'humbly advising' the King to give effect to their decision. These reasons are not stated in the report to the King: this merely sets forth their conclusion and the method proposed for giving effect to it. When the report has been submitted to the King, and approved by him at a meeting of the Privy Council, an Order of Council is made reciting the report, and adopting it as the judgment of the King in Council.

Dissentient judgment in House of Lords.

Some matters remain to be noted in which these Courts differ from one another.

The judgments of the House of Lords express the individual opinions of the members of the Court: they are not therefore necessarily unanimous, and the public is made aware that there are differences of opinion in the highest Court of Appeal.

Unanimity in Privy Council.

The Privy Council advises the Crown, and in so doing it is bound not to record dissentient opinion. The rule is not merely a matter of policy; it is one of the 'Orders to be observed in Assemblies of Council' made in 1627, never altered or repealed, and re-affirmed by Order in Council in 1878. It runs thus:—

'In voting of any cause the lowest Councillor in place is to begin and speak first, and so it is to be carried by most voices, because every Councillor hath equal vote there; and when the business is carried according to most voices, no publication is

[1] They are required to be so stated by 3 & 4 Will. IV, c. 41, s. 3.

afterwards to be made by any man how the particular voices and opinions went[1].'

The question whether or no a Court of Final Appeal ought to be unanimous or appear to be so is one of policy rather than of law. It does not at the first sight seem fitting that either Court should speak with an uncertain voice. But we must regard the practice of the House of Lords as settled; and to all intents the practice of the Privy Council is settled also.

The House of Lords holds itself bound by its decisions. The Privy Council, like the Supreme Court of the United States, though a court of final appeal, does not consider itself to be precluded from advising the King to reverse a judgment previously given[2].

The House of Lords is entitled to the assistance of the Judges of the High Court to advise on questions of law; for the Judges receive, at the summons of every Parliament, a writ of Attendance 'to treat and give advice,' and are bound to attend if called upon. But they are now rarely summoned. Formerly the House of Lords, for the formation of a Court of Appeal, was dependent on the presence of the Lord Chancellor, of one or more ex-Chancellors, and of eminent lawyers who might have been raised to the peerage with or without the tenure of high judicial office. The number of peers capable of taking part in the decision of difficult legal questions might at times be very small, and the assistance of the judges very necessary. Now that in addition to the presence of the Lord Chancellor, and the adventitious aid of unofficial Law Lords, there is always

[1] There has been much controversy as to the observance of this rule. I will be content to refer the reader to the evidence of Mr. H. Reeve before the Committee of the House of Lords on Appellate Jurisdiction, 1872, pp. 23-6, and to Lord Selborne's treatise on the Judicial Procedure of the Privy Council. Sir Walter Phillimore, in the Times, Oct. 28, 1891, at p. 3, published a list of cases in which dissent had been expressed, but as the rule has been re-affirmed by Order in Council, the controversy is merely historical.

[2] See cases mentioned by Mr. Reeve in his evidence before the Committee on Appellate Jurisdiction, p. 29, and also *Cushing* v. *Dupuy*, 5 App. Ca. 409, reviewing and practically overruling *Cuvillier* v. *Aylwyn*, 2 Knapp's P. C. 72; and see *Read* v. *Bishop of Lincoln* [1892] A. C. at p. 654.

a Court of four Lords of Appeal, the assistance of the judges is rarely required: in fact they have been summoned but once in the last twenty years, in 1898 in the case of *Allen* v. *Flood*[1]. But no one can attend the Judicial Committee unless he be a Privy Councillor, and summoned.

Section VI

The Crown in relation to the Courts

I have tried to describe the Courts through which the Crown administers justice to the subject. There are still some points to be considered before we conclude.

Admitting that all jurisdiction emanates from the Crown, we may ask whether the King can, at pleasure, create new, or interfere with the action of existing jurisdictions.

And again, admitting that the King's courts are open to all his subjects within their respective jurisdictions, we may ask whether the Crown in its own person, or that of its servants, is amenable to the rule of law and the procedure of the Courts.

§ 1. *Creation of Jurisdiction.*

Can the Crown create a new court

To the first of these questions it would seem safe to answer that the Crown cannot create a new court, nor confer a new jurisdiction on a court already existing. This is a rule laid down by great writers and embodied in judicial decisions of the highest authority[2]. It is illustrated by the invalidity of the letters patent whereby the Crown endeavoured to create ecclesiastical jurisdictions in South Africa.

in the United Kingdom,

As regards the United Kingdom, the matter is one of merely historical interest. The Common Law Courts grew up without statutory sanction. So too did the equitable jurisdiction of the Chancellor. The interference of the Star Chamber and Privy Council with the ordinary course

[1] [1898] A. C. 1. It must not be forgotten that they attended at the trial of Earl Russell, before the King in Parliament in July 1901. Supra, p. 275 note.

[2] Coke, 4 Inst. 200. Comyns, Digest Tit. Prerog. D. 28. *In re Lord Bishop of Natal*, 3 Moore, P. C., N. S. 152.

of the common law needed a statute for its abolition; while the Court of Requests, which met the requirements of the poor suitor, passed into disuse during the Commonwealth, and was not revived at the Restoration [1].

These illustrations serve to show that the limitations on the power of the Crown laid down by Coke and Comyns and adopted by Lord Westbury, were not always in force; that they are part of that gradual definition of the prerogative which I described in the first chapter of this book.

in the British possessions?

But in the British possessions the matter might be and has been of practical importance. The powers of the Crown over conquered or ceded territory do not seem to be precisely defined: but as regards settled colonies it seems clear that, unless statutory provision is otherwise made, the settlers take with them the common law of their own country; that the Crown can make provision for its administration by Order in Council or by letters patent in the form of a charter of justice [2], but cannot create a court for any other purpose.

Where a legislature exists the matter is now provided for by the Colonial Laws Act, 1865.

A question which arose some time before this Act was passed will furnish an illustration of the general rule.

Case of Newfoundland.

A colony possessing a local legislature was in want of a court of equitable jurisdiction. The Governor, holding the seal of the colony, was regarded as Chancellor, but he declined to exercise the judicial functions of a Chancellor, to administer the King's grace by enforcing the performance of trusts or protecting the property of infants. The law officers were asked whether the King had power to constitute by letters patent a Master of the Rolls for the colony with an equity jurisdiction. They advised that this could not be done: but they made two suggestions [3]. One was that an officer should be appointed who should be Vice-Chancellor to the Governor and should use those equitable powers which the Governor declined to use. But they said, 'In order to prevent doubts on the subject, we would recom-

[1] Supra, Part i, p. 70.

[2] *Jephson* v. *Riera*, 3 Knapp, 130.

[3] Opinion of Sir J. Scarlett and Sir N. Tindal. Forsyth, Cases in Constitutional Law, 173.

mend this to be done *with the aid of Parliament or the local legislature.*' The other suggestion was that an additional judge should be added to the existing Common Law Court, who should be an equity lawyer, and that the Court so constituted should obtain, *by the authority of Parliament or of the local legislature,* so much of an equity jurisdiction as would meet the wants of the province.

With regard to Protectorates which, though they are not British Territory, are in many cases practically under the sovereignty of the King, no such limitations exist to the power of the Crown, and provision is made by Proclamation for the administration of justice in such manner as the circumstances of the country concerned may require.

Can the Crown interfere with the course of justice?

The interference of the Crown in the administration of justice may be said to have ceased when the Act of Settlement altered the tenure of the judges. When the judges ceased to be removable at the royal pleasure they lost a motive for regarding the royal wishes in their administration of justice, and when at the same time they were made removable on the address of both Houses, they acquired a motive for carefulness lest their conduct on the Bench should fall under the scrutiny of the High Court of Parliament.

There are indeed powers exercisable by the Crown through its law officers by which it has a control over judicial proceedings not available to the subject. But these are chiefly matters in which the property of the Crown is concerned; such as the right of the Crown to remove a case affecting its revenue from the Chancery to the King's Bench Division [1], or its right as against a trustee in Bankruptcy to property of the debtor taken under an extent between the act of bankruptcy and the appointment of the trustee [2].

Matters of Crown property.

To these matters the general rule applies that an existing prerogative of the Crown can only be taken away by express words in a statute. But beyond a statement of the principle it would not be desirable to go further into this topic.

[1] *Attorney-Gen.* v. *Constable,* 4 Ex. D. 172.
[2] *In re Bonham,* 10 Ch. D. 595.

The prerogative of mercy.

In so far as the prerogative of mercy, exercised by reprieve, commutation of sentence, or pardon constitutes an interference with the course of justice it has been dealt with elsewhere.

§ 2. *Liability to Jurisdiction.*

Remedies of the subject.

It may be stated as a general rule that no action can be brought against the sovereign in person by a subject. But the departments of Government enter necessarily into many and various relations with the King's subjects, and the officers of these departments, through whom these relations are established, represent the executive—that is, the Crown. What then is the remedy where a subject alleges a cause of action, legal or equitable, against the King, or a servant of the Crown representing a department of the King's Government?

Special statutory liability,

Certain departments of Government seem to exhibit a departure from the general rule laid down. This is because they possess an express statutory right, and are under an express statutory liability, to sue and be sued by the ordinary modes of procedure. The War Office in the person of the Secretary of State for War may bring and defend actions in respect of certain specified liabilities. The Secretary of State for India in Council succeeds to the rights and duties, as regards civil actions, of the East India Company. These are illustrations; others may be supplied in the case of other departments[1]; but the statutory liability must be construed strictly, and cannot safely be expanded into a matter of general principle[2].

Again, a statutory duty to members of the public may be laid upon certain departments, and where its discharge is not at the discretion of the department a *mandamus* will

[1] For a full account of these exceptions see Robertson, Civil Proceedings by and against the Crown.

[2] I say this with all deference to the learned judges who decided the case of *Graham* v. *Commissioners of Works* [1901], 2 K. B. 731. They held that the Commissioners might be sued for breach of contract in the ordinary forms of procedure, though not under any statutory liability. The judges, though they came to the same conclusion, reached it by different lines of argument, and the conclusion can hardly therefore be regarded as final.

lie to constrain performance in the event of neglect or refusal.

But where there is no such statutory liability to be sued by ordinary process, and no duty to the public as distinct from duty to the King, the subject who conceives himself to have a cause of action against the King, or a servant of the King acting directly on his behalf, must proceed by Petition of Right. Or Petition of Right.

The nature of the remedy is this. The King being informed by his principal Secretary of State for the Home Department that one of his subjects alleges a cause of action against him and has entered a petition to that effect, orders the petition to be endorsed with the *fiat* 'let right be done,' and the suit thereafter proceeds in the ordinary course as between subject and subject. The procedure under which petitions of right are lodged and the subsequent proceedings conducted is fixed by various statutes imperial [1] and colonial.

But we are not so much concerned with the method of procedure as with the extent of the remedy. Apart from statutory extension we may say in the words of Cockburn, C.J., subsequently adopted in the Judicial Committee, that— Limits of the remedy.

'the only cases in which the petition of right is open to the subject are, where the land, or goods, or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or if restitution cannot be given, compensation in money, or when a claim arises out of a contract, as for goods supplied to the Crown or to the public service [2].'

The remedy is thus held to extend to cases of property wrongfully taken or withheld, and to damages, liquidated or unliquidated [3], for breach of contract.

[1] For England, 23 & 24 Vict. c. 34; for Scotland, 20 & 21 Vict. c. 44; for Ireland, 36 & 37 Vict. c. 69; and see Clode, Petition of Right, pp. 213-38; and Robertson, Civil Proceedings by and against the Crown.

[2] *Feather* v. *The Queen*, 6 B. & S. 293, cited with approval in *Windsor and Annapolis Railway Co.* v. *The Queen*, 11 App. Ca. p. 615.

[3] *Thomas* v. *The Queen*, L. R. 10 Q. B. 31.

'The King can do no wrong.'

But it does not extend to cases of wrong alleged to be done by the King or his servants acting on his behalf. In *Tobin* v. *The Queen*[1] the petitioner alleged that the captain of a Queen's ship employed in the suppression of the slave trade had taken and burnt a schooner belonging to him, under the mistaken impression that it was engaged in the slave trade. The Court, among other grounds for deciding adversely to the petitioner, laid it down that 'the maxim that the King can do no wrong' is true in the sense that he is not liable to be sued civilly or criminally for a supposed wrong; and a passage from Hale's Pleas of the Crown was cited, 'the law presumes that the King will do no wrong, neither indeed can do any wrong: and therefore if the King command an unlawful act to be done the offence of the instrument is not thereby indemnified.'

Waiver of immunity.

This exemption from procedure by way of petition of right in cases of tort has been waived by the Crown in various colonial statutes and ordinances[2], but in the United Kingdom the King acting through his servants cannot be made liable for wrong.

Liability of King's servants.

Then how far are the King's servants personally liable for contract broken, wrong done, or breach of duty committed?

As regards liability for contract, it may be stated shortly that a servant of the Crown who contracts on behalf of the Government cannot be made personally liable[3].

As regards wrong, no servant of the Crown may set up as defence to a wrongful act the express orders of the Crown, or orders implied by the allegation that what he did was an act of State. The lawfulness of the act complained of is determinable in a Court of Law. The case of *Entick* v. *Carrington*[4] contains words which though more than a hundred years old will meet every case of this character:—

State necessity no answer.

'With respect to the argument of state necessity or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of

[1] 16 C. B., N. S. 310.

[2] See *Farnell* v. *Bowman*, 12 App. Ca. 643; *Attorney-General of Straits Settlements* v. *Wemyn*, 13 App. Ca. 192.

[3] *Gidley* v. *Lord Palmerston*, 3 B. & B. 284.

[4] 19 State Trials, 1030.

reasoning, nor do our books take notice of any such distinction.'

Exceptions: military officer,

Two classes of state officers, military and judicial, seem to stand on an exceptional footing as regards this rule. The nature and limits of the exemption of the military officer from liability for what would otherwise amount to actionable defamation has been explained in an earlier chapter[1]. It rests on the terms of the Army Act. A remedy is there provided for such cases, and the person who subjects himself to military law must be presumed to accept this in lieu of the ordinary remedies supplied by the Courts.

judicial officer.

The judicial exemption is based on a larger ground of public interest.

'No action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice. This doctrine has been applied not only to the superior courts, but to the court of a coroner and to a court-martial, which is not a court of record. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him[2].'

The Lord Lieutenant of Ireland.

The general liability of officers of the Crown was dealt with in dealing with the position and duties of a colonial governor[3]. They are liable for the legal consequences of acts done in their official capacity unless the terms of their

[1] *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 94, supra, p. 188.

[2] *Scott* v. *Stanfield*, L. R. 3 Exch. 223; and see *Anderson* v. *Gorrie* [1895], 1 Q. B. (C. A.), 668.

[3] See supra, pp. 81, 82.

appointment and powers conferred by it can be shown to justify those acts[1]. I can add nothing to what I have already said on this subject, except to note that the Lord Lieutenant of Ireland occupies an exceptional position, and one nearer akin to royalty than that of any other colonial governor or viceroy. It has been held in a series of Irish cases, the last of which is *Sullivan* v. *Spencer*[2], that the Lord Lieutenant of Ireland is not liable in the Irish courts, during his term of office, for any act done in his politic capacity. The case is a strong one. It was an action of assault committed in the course of the suppression, by order of the Lord Lieutenant, of a public meeting. The Attorney-General for Ireland moved the Court of Queen's Bench in Dublin 'that all proceedings against the Lord Lieutenant be stayed,' and that the name of 'his excellency be struck out of the summons and plaint.' And the Court said—'What we now decide is that for an act done by the Lord Lieutenant, as Viceroy of this kingdom, in his official capacity, no action can be maintained against him in this country, where he exercises the supreme authority vested in him by the Crown, and while he bears that authority.' The case of *Sullivan* v. *Spencer* is not in accord with that of *Musgrave* v. *Pulido*[3]. It may be that the Lord Lieutenant of Ireland was intended to occupy an exceptional position; and this is illustrated by the fact that his chief secretary, unlike the under secretaries of other ministers, is regarded as holding office under the Crown, so as to vacate his seat upon appointment, as though the Lord Lieutenant were a more direct representative of the Crown than are the governors of dependencies.

Sullivan v. *Spencer.*

Courts will not enforce duty to the Crown, but only duty to the public.

A further question remains to be considered. How far can a servant of the Crown be required to discharge a duty laid on him towards the subject?

It would seem, as the result of numerous authorities, that proceedings, whether by *mandamus*, action for money due, or in the Chancery Division for an account, will not

[1] As to this liability and its limitations see Robertson, pp. 641–2 and cases there cited.

[2] 6 Irish Reports, C. L. 176.

[3] 5 App. Ca. 102; supra, p. 82.

lie against servants of the Crown as such, unless it can be shown that Parliament by statute, or the Crown by letters patent or otherwise, has cast upon them a duty to the public, as distinct from their duty to the Crown.

Illustration: action for money due against Secretary at War.

In *Gidley* v. *Lord Palmerston*[1] the plaintiff, as executor, sued the Secretary at War for money due to his testator on account of sums voted by Parliament for retired allowances of officers, of whom the testator was one. It was held that the action could not be maintained, on the ground, firstly, that Lord Palmerston was only the agent or officer of the Crown, responsible to the Crown for the due discharge of his duty, and secondly, on the ground that 'a servant of the Crown contracting on the part of the Government is not personally liable.' There was neither duty to the subject nor personal liability.

Suit for account against Secretary of State for India.

Kinloch v. *The Secretary of State for India in Council*[2] was a case of somewhat different character. The Crown had placed a sum of money in the hands of the Secretary of State for India for the time being in trust for certain persons, of whom the plaintiff claimed to be one. He applied for an account and distribution of an undistributed portion of the sum in question. It was held that the Secretary of State was only an agent of the Crown for the purpose of the distribution, and could not be treated as a trustee in the ordinary sense of the term; here again the duty was to the Crown alone.

Mandamus asked for to Secretary of State for War.

In *The Queen* v. *The Secretary of State for War*[3] the plaintiff asked for a *mandamus* to the Secretary of State to command him to consider and determine sums alleged to be due to him under a royal warrant of which the Secretary was 'the sole administrator and interpreter.' It was held that the duty cast upon the Secretary of State by the royal warrant was neither a common law nor a statutory duty, but, 'a duty between him and the Crown only.' In the Court of Appeal it was held that 'the appeal must fail on the grounds, first, that a *mandamus* would not lie against the Crown, and secondly, that it will not lie

[1] 3 Broderip and Bingham, 284 (1822). [2] 7 App. Ca. 619 (1882).
[3] 2 Q. B. (1891), 326.

against the Secretary of State, because in his capacity as such he is only responsible to the Crown, and has no legal duty imposed on him towards the subject.'

Distinctions.

The question to be determined in these cases must always be, whether the servant of the Crown has a duty cast upon him *to the public* as well as to the Crown either by statute or at common law[1]. If so, he may be compelled by *mandamus* to discharge it. If not, he is responsible only to the Crown and to Parliament.

There only remains for consideration the question of the rights of the person employed by the Crown to proceed by Petition of Right, for alleged wrongful dismissal, or for other injury, against the Crown.

As regards the conditions of tenure, the servants of the Crown, whether civil or military, hold office during pleasure, unless, as in the case of the Judges, the Council of India, or the Controller and Auditor-General, they are appointed on a statutory tenure, during good behaviour. The person employed, therefore, has no remedy though engaged and dismissed by another servant of the Crown holding office on the same conditions[2]. It is difficult to see what remedy is available to a servant of the Crown for a breach of the conditions under which he entered upon his employment.

[1] See for a distinction between cases in which a public duty is or is not cast on the public servant, the cases *In re Nathan*, 12 Q. B. D. 461, and *Reg.* v. *The Commissioners of Income Tax*, 21 Q. B. D. 313.

[2] *Dunn* v. *The Queen* [1896], 1 Q. B. C. A. 116. Dunn had been engaged by Sir Claude Macdonald, H.M. Commissioner for the Niger Protectorate, as consular agent for three years, and dismissed within the period for which he had been engaged.

APPENDIX

COLONIAL OFFICE

Commissions, Letters Patent, and Instructions

§ 1. *COMMISSION passed under the Royal Sign Manual and Signet appointing Lieutenant-Colonel Sir Edouard Percy Cranwill Girouard, R.E., K.C.M.G., D.S.O., to be Governor and Commander-in-Chief of the Protectorate of Northern Nigeria.*

Dated 18th April, 1908. EDWARD R. & I.

Edward the Seventh, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India: To Our Trusty and Well-beloved Sir Edouard Percy Cranwill Girouard, Captain in Our Corps of Royal Engineers, having the Brevet rank of Lieutenant-Colonel in Our Army, Knight Commander of Our Most Distinguished Order of Saint Michael and Saint George, Companion of Our Distinguished Service Order, Greeting.

WE do, by this Our Commission under Our Sign Manual and Signet, appoint you, the said Sir Edouard Percy Cranwill Girouard, to be, during Our pleasure, Our Governor and Commander-in-Chief in and over Our Protectorate of Northern Nigeria, with all the powers, rights, privileges, and advantages to the said Office belonging or appertaining.

Appointment of Lieutenant-Colonel Sir E. P. C. Girouard, R.E., K.C.M.G., D.S.O., as Governor.

II. And We do hereby authorize, empower, and command you to exercise and perform all and singular the powers and directions contained in the Order of Her late Majesty Queen Victoria in Her Privy Council (constituting the Office of High Commissioner), bearing date the Twenty-seventh day of December 1899, and in Our Order in Council bearing date the Nineteenth day of March 1908 (altering the designation of the Office of High Commissioner to that of Governor and Commander-in-Chief), or in any other Order or Orders in Council adding to, amending, or substituted for the same, according to such Orders and Instructions as Our said High Commissioner

Duties under Order in Council of 27th December 1899, constituting the office of High Commissioner, and Order in Council of 19th March 1908.

for the time being hath already received, or as you may hereafter receive from Us.

Commission of 12th February 1907 superseded.

III. And We do hereby appoint that from the date of the coming into operation of the said Order in Council of the Nineteenth day of March 1908 this Our present Commission shall supersede Our Commission under Our Sign Manual and Signet, bearing date the Twelfth day of February 1907, appointing you to be Our High Commissioner and Commander-in-Chief in and for Our Protectorate of Northern Nigeria.

Officers and others to obey the Governor.

IV. And We do hereby command all and singular Our Officers and loving subjects in Our said Protectorate, and all others whom it may concern, to take due notice hereof, and to give their ready obedience accordingly.

Given at Our Court at Saint James's this Eighteenth day of April 1908, in the Eighth year of Our Reign.

By His Majesty's Command.

CREWE.

§ 2. *COMMISSION passed under the Royal Sign Manual and Signet, appointing The Right Honourable the Earl of Selborne, P.C., to be High Commissioner for South Africa.*

Dated 15th March, 1905. EDWARD R. & I.

EDWARD THE SEVENTH, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India: To Our Right Trusty and Right Well-beloved Cousin and Councillor William Waldegrave, Earl of Selborne, Greeting.

Appointment of the Earl of Selborne to be High Commissioner.

WE do, by this Our Commission under Our Sign Manual and Signet, appoint you, the said William Waldegrave, Earl of Selborne, to be, during Our pleasure, Our High Commissioner for South Africa, and as such High Commissioner to act in Our name and on Our behalf, and in all respects to represent Our Crown and authority in matters occurring in South Africa beyond the limits of Our Colonies of the Cape of Good Hope and Natal, and beyond the limits of any other place or territory in South Africa, in and over which We may from time to time have appointed a Governor.

Powers and duties of

II. And We do hereby authorize, empower, and command you to exercise in Our name and on Our behalf all jurisdiction,

power, and authority in regard to Basutoland, the Bechuanaland Protectorate, Southern Rhodesia, and Barotziland, North-Western Rhodesia, or elsewhere, which are now or shall hereafter be vested in Our said High Commissioner. High Commissioner.

III. And We do hereby authorize, empower, and command you, as such Our High Commissioner, to transact in Our name and on Our behalf all business which may lawfully be transacted by you with the Representative of any Foreign Power in South Africa, subject nevertheless to such instructions as you may from time to time receive from Us or through one of Our Principal Secretaries of State. And We do require you, by all proper means, to invite and obtain the co-operation of the Government of any Foreign Power in South Africa towards the preservation of peace and safety in South Africa, and the general welfare and advancement of its territories and peoples. High Commissioner empowered to transact all lawful business with the Representative of any Foreign Power in South Africa.

IV. And We do hereby authorize, empower, and command you as such Our High Commissioner, in Our name and on Our behalf, to take all such measures, and to do all such things in relation to the Native Tribes in South Africa with which it is expedient that We should have relations, and which are not included within the territory of any Foreign Power, or within any territory for the administration of which We may from time to time have otherwise provided, as are lawful and appear to you to be advisable for maintaining Our Possessions in peace and safety, and for promoting the peace, order, and good government of the Tribes aforesaid, and for preserving friendly relations with them. Dealings with Native Tribes.

V. And We do hereby authorize and empower you, by Instruments under your hand and seal, to appoint so many fit persons as in the interest of Our Service you shall think necessary to be your Deputy Commissioners, or to be Resident Commissioners or Assistant Commissioners, and by the same or other Instruments to define the districts within which such officers shall respectively discharge their functions: And We do hereby authorize and empower every such Deputy or Resident or Assistant Commissioner to have and exercise within his district such of the powers and authorities hereby conferred upon you, Our said High Commissioner, as you shall think fit to assign to him by the Instrument appointing him, subject nevertheless to such directions and instructions as you High Commissioner empowered to appoint Deputy, Resident, or Assistant Commissioners. Powers and authorities of such Commissioners.

may from time to time think fit to give him. And We do declare that the appointment of such Deputy or Resident or Assistant Commissioners shall not abridge, alter, or affect the right of you, Our said High Commissioner, to execute and discharge all the powers, authorities, and functions of your said office.

Officers administering the Governments of the various British Colonies and Protectorates in South Africa to be invited to send representatives to confer on subjects of common interest.

VI. And whereas it is desirable that the administrations of our various Colonies and Protectorates in South Africa should act in harmony in regard to subjects of common interest, such as the treatment of natives, the control of armed forces, the traffic in arms and ammunition, and the working of railways, posts, and telegraphs, We do direct you from time to time, as may seem to you expedient, to invite the Officers administering the Governments of Our said Colonies and Protectorates to send representatives to confer with you as such Our High Commissioner and with each other on the measures to be taken in regard to any or all of such subjects of common interest.

Supersedes Commission of the 6th October, 1900.

VII. And further We do hereby appoint that, so soon as you shall have entered upon the duties of the office of High Commissioner, this Our present Commission shall supersede the Commission under the Sign Manual and Signet of Her late Majesty Queen Victoria, bearing date the sixth day of October 1900, appointing Sir Alfred Milner (now Our Right Trusty and Well-beloved Cousin and Councillor, Viscount Milner, Knight Grand Cross of Our Most Honourable Order of the Bath, Knight Grand Cross of Our Most Distinguished Order of Saint Michael and Saint George), to be High Commissioner.

Officers and others to aid and assist the High Commissioner.

VIII. And We do hereby command all and singular Our Officers and Ministers, Civil and Military, and all the inhabitants of Our Possessions, and all other Our loyal subjects in South Africa, to be aiding and assisting unto you, in execution of this Our Commission.

Given at Our Court at Saint James's, this Fifteenth day of March 1905, in the Fifth year of our Reign.

By His Majesty's Command.

ALFRED LYTTELTON.

§ 3. *Letters Patent constituting the office of Governor and Commander-in-Chief of the Transvaal.*

EDWARD THE SEVENTH by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India: To all to whom these Presents shall come, Greeting.

Recites Letters Patent of 23rd September, 1902.

WHEREAS by our Letters Patent under the Great Seal of our United Kingdom of Great Britain and Ireland bearing date at Westminster the Twenty-third day of September, 1902, We did constitute the office of Governor and Commander-in-Chief of our Colony of the Transvaal and did provide for the Government of our said Colony: And whereas we are minded to make further provision for the Government of our said Colony:

Now know ye that We do declare our Will and Pleasure to be as follows:—

Appointment of Governor.

I. There shall be a Governor and Commander-in-Chief in and over Our Colony of the Transvaal, and appointments to the said Office shall be made by Commission under our Sign Manual and Signet.

Limits of Colony.

II. Our Colony of the Transvaal (hereinafter called the Colony) shall comprise all places, settlements, and territories which formed part of the territories of the South African Republic at the date when the said territories were annexed to and became part of Our dominion, save and except the districts known as Vryheid and Utrecht, together with certain parts of the district of Wakkerstroom which have been included within the limits of our Colony of Natal.

Governor's powers and authorities.

III. We do hereby authorize and empower and command our said Governor and Commander-in-Chief (hereinafter called the Governor), to do and execute all things that belong to the said office of Governor according to the tenor of these and any other Our Letters Patent, having effect within the Colony, and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us through one of Our Principal Secretaries of State, and

to such laws as are now or shall hereafter be in force in the Colony.

Publication of Commission and taking of oaths by Governor.

IV. Every person appointed to fill the Office of Governor shall, with all due solemnity, before entering on any of the duties of his Office, cause the Commission appointing him to be read and published in the presence of the Chief Justice of the Colony, or of some other Judge of the Supreme Court, and such of the members of the Executive Council of the Colony who can conveniently attend, which being done he shall then and there take before them the Oath of Allegiance in the form provided by an Act passed in the Session holden in the Thirty-first and Thirty-second year of the Reign of Her late Majesty Queen Victoria, intituled 'an Act to amend the law relating to Promissory Oaths': and likewise the usual Oath for the due execution of his Office and for the due and impartial administration of justice, which oaths the said Chief Justice or Judge is hereby required to administer.

Public Seal.

V. The Governor shall keep and use the Public Seal of the Colony for sealing all things whatsoever that shall pass the said Seal.

VI. There shall be an Executive Council in and for the Colony, and the said Council shall consist of such persons being Ministers or other persons as the Governor shall from time to time in Our name and on Our behalf but subject to any law of the Colony, appoint under the Public Seal of the Colony to be members thereof. Subject to any such law the members of the Executive Council shall hold office during our pleasure. Provided that the members of the Executive Council, existing at the commencement of these Our Letters Patent, may, if the Governor thinks fit, continue to hold office until the appointment of Ministers.

Grant of lands.

VII. The Governor may, in Our name and on Our behalf, make and execute, under the Public Seal, grants and dispositions of any lands within the Colony which may be lawfully granted or disposed of by Us.

Appointment of Officers.

VIII. The Governor may constitute and appoint in Our name and on Our behalf all such officers in the Colony as may be lawfully constituted or appointed by Us.

Suspension or removal from office.

IX. The Governor may, so far as We Ourselves lawfully may, upon sufficient cause to him appearing, remove from his

office, or suspend from the exercise of the same, any person holding any office or place within the Colony under or by virtue of any Commission or Warrant or other Instrument granted, or which may be granted, by Us or in Our name or under Our authority or by any other mode of appointment.

Grant of Pardon and remission of sentence.

X. When any crime or offence has been committed within the Colony, or for which the offender may be tried therein, the Governor may, as he shall see occasion, in Our name and on Our behalf, grant a pardon to any accomplice in such crime or offence who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one: and further, may grant to any offender convicted of any such crime or offence in any Court, or before any Judge or Magistrate, within the Colony, a pardon either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite of the execution of such sentence, for such period as he may think fit, and may remit any fines, penalties, or forfeitures due or accrued to Us. Provided always, that if the offender be a natural born British Subject, or a British subject by naturalization in any part of Our Dominions, the Governor shall in no case, except where the offence has been of a political nature, unaccompanied by any other grave crime, make it a condition of any pardon or remission of sentence that the offender shall be banished from or shall absent himself from our said Colony.

[XI, XII, XIII make provision (*a*) for the succession to the Government in the event of death, incapacity, removal, or absence from South Africa of the Governor; (*b*) for the continuance of the exercise of his powers by the Governor if absent from the Colony, in some other part of South Africa on business of state, for not more than one month; (*c*) for the appointment of a Deputy by the Governor during a brief temporary absence either from the seat of Government or from the Colony.]

XIV. And we do hereby require and command all Our Officers and Ministers, Civil and Military, and all other the inhabitants of the Colony, to be obedient, aiding and assisting unto the Governor, or to such person or persons as may from

time to time, under the provisions of these Our Letters Patent, administer the Government of the Colony.

XV. In the construction of these our Letters Patent the term 'the Governor,' unless inconsistent with the context, shall include every person for the time being administering the Government of the said Colony.

[XVI reserves power to revoke, alter, or amend the Letters Patent.]

XVII. And we do direct and enjoin that these Our Letters Patent shall be read and proclaimed at such place or places within the Colony as the Governor shall think fit, and shall commence and come into operation on a day to be fixed by the Governor by Proclamation in the Transvaal Government Gazette[1].

In witness whereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster this Sixth day of December, in the Sixth year of Our Reign.

By Warrant under the King's Sign Manual.

MUIR MACKENZIE.

§ 4. *COMMISSION passed under the Royal Sign Manual and Signet, re-appointing the Right Honourable the Earl of Selborne, P.C., G.C.M.G., to be Governor and Commander-in-Chief of the Transvaal.*

Dated 19th December, 1906. EDWARD R. & I.

EDWARD THE SEVENTH, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India: To Our Right Trusty and Right Well-beloved Cousin and Councillor William Waldegrave, Earl of Selborne, Knight Grand Cross of Our Most Distinguished Order of Saint Michael and Saint George, Greeting.

Appointment of the Right Honourable the Earl of Selborne, P.C., G.C.M.G., to be Governor.

WE do, by this Our Commission under Our Sign Manual and Signet, appoint you the said William Waldegrave, Earl of Selborne, to be, during Our pleasure, Our Governor and Commander-in-Chief in and over Our Colony of the Transvaal, with

[1] By Proclamation in the Transvaal Government Gazette these Letters Patent were brought into operation on Jan. 12, 1907.

all the powers, rights, privileges, and advantages to the said Office belonging or appertaining.

His Duties and Powers under Letters Patent, dated 6th December 1906, constituting the Office of Governor, &c.

II. And We do hereby authorize, empower, and command you to exercise and perform all and singular the powers and directions contained in certain Letters Patent under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing date at Westminster the Sixth day of December 1906, constituting the said Office of Governor and Commander-in-Chief in and over the Transvaal, or in any other Letters Patent relating to Our said Colony, according to such Orders and Instructions as Our said Governor and Commander-in-Chief for the time being hath already received, and to such further Orders and Instructions as you may hereafter receive from Us.

Commission of 15th March 1905 superseded.

III. And We do hereby appoint that, from the date of the coming into force of the above-recited Letters Patent of the Sixth day of December 1906, this Our present Commission shall supersede the Commission under Our Sign Manual and Signet bearing date the Fifteenth day of March 1905, appointing you the said William Waldegrave, Earl of Selborne, to be Our Governor and Commander-in-Chief in and over Our Colony of the Transvaal.

Officers, &c., to obey the Governor.

IV. And We do hereby command all and singular Our Officers, Ministers and loving subjects in Our said Colony, and all others whom it may concern, to take due notice hereof and to give their ready obedience accordingly.

Given at Our Court at Saint James's this Nineteenth day of December 1906, in the Sixth year of Our Reign.

By His Majesty's Command.

ELGIN.

§ 5. *INSTRUCTIONS passed under the Royal Sign Manual and Signet, to the Governor and Commander-in-Chief of a Crown Colony.*

Dated 13th January, 1886. VICTORIA R.

INSTRUCTIONS to Our Governor and Commander-in-Chief in and over Our Colony, and to Our Lieutenant-Governor or other Officer for the time being administering the Government of Our said Colony.

Given at Our Court at Osborne House, Isle of Wight, this day of January 18 in the year of Our Reign.

Recital of Letters Patent.

WHEREAS by certain Letters Patent under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing even date herewith, We have constituted, ordered, and declared that there shall be a Governor and Commander-in-Chief (therein and hereinafter called the Governor) in and over Our Colony as therein described (therein and hereinafter called the Colony): And whereas We have thereby authorized and commanded the Governor to do and execute all things that belong to his said office, according to the tenor of Our said Letters Patent and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him under Our Sign Manual and Signet, or by Our Order in Our Privy Council or through one of Our Principal Secretaries of State, and to such laws as are now or shall hereafter be in force in the Colony:

Revocation of earlier instructions.

And whereas We are minded to issue these Our Instructions under Our Sign Manual and Signet for the guidance of the Governor, Lieutenant-Governor, or other Officer administering the Government of the Colony: Now, therefore, We do hereby revoke Our Instructions under Our Sign Manual and Signet bearing date the of relating to Our Colony as heretofore constituted, and We do hereby direct and enjoin and declare Our will and pleasure, as follows:—

[I–II. Provisions for administering Oaths of Allegiance, and for absence of Governor.]

Composition of Executive Council.

IV. The Executive Council of the Colony shall consist of the following Members, that is to say: the Lieutenant-Governor of the Colony (if any), the Senior Military Officer for the time being in command of Our regular troops within the Colony, the Officers lawfully discharging the functions of Colonial Secretary, of Queen's Advocate, and of Treasurer of the Colony, and such other persons as We may from time to time appoint by any Instruction or Warrant under Our Sign Manual and Signet.

Whenever upon any special occasion the Governor desires to obtain the advice of any person within the Colony touching Our affairs therein, he may, by an Instrument under the Public Seal of the Colony, summon for such special occasion

any such person as an Extraordinary Member of the Executive Council.

IV–XIII. Procedure of Executive Council.

XIII. The Legislative Council of the Colony shall consist of the Governor, the Lieutenant-Governor (if any), the Chief Justice or acting Chief Justice, the Senior Military Officer for the time being in command of Our Regular Troops within the Colony, the persons from time to time lawfully discharging the functions of Colonial Secretary, Queen's Advocate, and Treasurer of the Colony, and such other persons holding offices in the Colony as We may from time to time appoint by any Instructions or Warrants, under Our Sign Manual and Signet, and all such persons shall be styled Official Members of the Legislative Council; and further of such persons, not holding offices in the Colony, as We may from time to time appoint by any Instructions or Warrants under Our Sign Manual and Signet, and all such persons shall be styled Unofficial Members of the Legislative Council.

Composition of Legislative Council.

XIII–XXIII. Procedure of Legislative Council.

XXIII. The Governor shall not, except in the cases hereunder mentioned, assent in Our name to any Ordinance of any of the following classes:—

Ordinances to which the Governor may not assent without reserve.

1. Any Ordinance for the divorce of persons joined together in holy matrimony.

2. Any Ordinance whereby any grant of land or money, or other donation or gratuity, may be made to himself.

3. Any Ordinance whereby any increase or diminution may be made in the number, salary, or allowances of the public officers.

4. Any Ordinance affecting the Currency of the Colony or relating to the issue of Bank notes.

5. Any Ordinance establishing any Banking Association, or amending or altering the constitution, powers, or privileges of any Banking Association.

6. Any Ordinance imposing differential duties.

7. Any Ordinance the provisions of which shall appear inconsistent with obligations imposed upon Us by treaty.

8. Any Ordinance interfering with the discipline or control of Our forces by land or sea.

9. Any Ordinance of an extraordinary nature and importance, whereby Our prerogative or the rights and property of Our subjects not residing in the Colony, or the trade and shipping of Our United Kingdom and its dependencies, may be prejudiced.

10. Any Ordinance whereby persons not of European birth or descent may be subjected or made liable to any disabilities or restrictions to which persons of European birth or descent are not also subjected or made liable.

11. Any Ordinance containing provisions to which Our assent has been once refused, or which have been disallowed by Us.

Unless such Ordinance shall contain a clause suspending the operation of such Ordinance until the signification of Our pleasure thereupon, or unless the Governor shall have satisfied himself that an urgent necessity exists requiring that such Ordinance be brought into immediate operation, in which case he is authorized to assent in Our name to such Ordinance, unless the same shall be repugnant to the law of England, or inconsistent with any obligations imposed on Us by treaty. But he is to transmit to Us, by the earliest opportunity, the Ordinance so assented to, together with his reasons for assenting thereto.

[The remainder of the instructions relate to details as to the Government of the Colony.] V.R.[1]

TREASURY

§ 1. Royal Order

Supply Services

EDWARD R.

Whereas the several sums mentioned in the Schedule hereunto annexed have been granted to Us, by

to defray the expenses of the Public Supply Services therein specified, which will come in course of payment in the year ending 31st March 19 Our Will and Pleasure is, that you do, from time to time, authorize the Governor and Company of

[1] Instructions are signed at the head and initialed at the foot by the King, and are sealed with the Signet: but are not countersigned by the Secretary of State. This makes them an exceptional document.

the Bank of England; or the Governor and Company of the Bank of Ireland, to issue or transfer from the account of Our Exchequer at the said Banks to the accounts of the persons charged with the payment of the said Services such sums as may be required, from time to time, for the payment of the same, not exceeding the amounts respectively stated in the said annexed Schedule.

Provided that such issues or transfers shall be made out of the Credits granted or to be granted to you from time to time, on the account of Our Exchequer at the said Banks, by the Comptroller and Auditor General, under the authority of the Exchequer and Audit Departments Act 1866 (29 & 30 Vict. c. 39, s. 15), and shall not exceed in the whole the amount of the Credits so granted out of the Ways and Means appropriated by Parliament to the Service of the said year.

Given at Our Court at this 19

By His Majesty's Command.

To be countersigned by two Lords of the Treasury.

To the Commissioners of Our Treasury.

SCHEDULE.

Supply Services for which voted or granted.	Amount.	Resolutions reported.
	£ s. d.	

§ 2. Requisition for Credit or Supply Services.

Supply Services.

Year 19 .

Treasury, Whitehall,

19

By Virtue of the Exchequer and Audit Departments Act 1866 (29 & 30 Vict. c. 39, s. 15): We authorize and require you to grant to the Lords Commissioners of His Majesty's Treasury for the time being, on account of the Ways and Means granted for the service of the year ending 31st March, 19 , Credits on the account of His Majesty's Exchequer at

the Bank of England and Bank of Ireland, or on the growing balances thereof for the following sums, viz. :—

At the Bank of England . . . £
At the Bank of Ireland . . . £

To be signed by two Lords of the Treasury.

To the Comptroller and Auditor General.

---

§ 3. Grant of Credit by the Comptroller and Auditor General for Supply Services.

Credit for Supply Services.

Year 19 .

By virtue of the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39, s. 15), and of a Requisition from the Lord's Commissioners of His Majesty's Treasury, authorizing the same: I hereby grant a Credit to the Lords Commissioners of His Majesty's Treasury for the time being, on Account of His Majesty's Exchequer at the Bank of , or on the growing Balance thereof, to the Amount of on account of the Ways and Means granted for the Service of the year ending 31st March, 19 .

Exchequer & Audit Department, 19 . } *Comptroller & Auditor General.*

To the Governor & Company of the Bank of .

---

§ 4. Treasury Orders for Issues from the Exchequer Account for Supply Services.

Supply Services.

Year 19 .

Treasury, Whitehall,
19 .

Gentlemen,

Under the authority of the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39, s. 15), and of the Credit

granted to the Lords Commissioners of His Majesty's Treasury, by the Comptroller and Auditor General, on the Account of His Majesty's Exchequer at the Bank of , under the provisions of the said Act: I am commanded by the Lords Commissioners of His Majesty's Treasury to request that you will transfer the following sums, on the instant, from the said Account to the 'Supply Account' of [His Majesty's Paymaster-General [1]] in your books, on account of the Supply Services undermentioned:—

Supply Services.	Amount.		
	£	s.	d.

I am to request that when these sums shall have been transferred accordingly, you will transmit this authority to the Comptroller and Auditor General.

I am, &c.

To be signed by one of the Secretaries of the Treasury.

To the Governor and Company of the Bank of .

---

§ 5. Requisition for Credit.

Consolidated Fund Services.

Growing Produce.

Treasury, Whitehall,

19 .

By virtue of the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39, s. 13): We authorize and require you to grant to the Lords Commissioners of His Majesty's Treasury for the time being a Credit on the Account of His Majesty's Exchequer at the Bank of England for the sum of £ to provide for issues required for the following Services payable out of the growing produce

[1] [Or of such other Principal Accountants as the case may require.]

of the Consolidated Fund in the current Quarter ending 190 .

Service.	Account.	Amount.

To be signed by two Lords of the Treasury.

To the Comptroller and Auditor General.

---

§ 6. Treasury Requisition authorizing Credits for Consolidated Fund Services.

Consolidated Fund Services.

Quarter to , 19 .

By virtue of the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39, s. 13): We authorize and require you to grant to the Lords Commissioners of His Majesty's Treasury for the time being, on account of the charge of the Consolidated Fund for the quarter ended , 19 , remaining unpaid at that date, Credits on the Accounts of His Majesty's Exchequer at the Bank of England and Bank of Ireland, or on the growing Balances thereof, for the following sums, viz. :—

At the Bank of England . . . £
At the Bank of Ireland . . . £

To be signed by two Lords of the Treasury.

Treasury Chambers, Whitehall, 19 .

To the Comptroller and Auditor General.

---

§ 7. Grant of Credit by the Comptroller and Auditor General for Services Payable out of the Consolidated Fund.

Credit for Consolidated Fund Services.

Quarter to , 19 .

By virtue of the Exchequer and Audit Departments Act,

1866 (29 & 30 Vict. c. 39, s. 13), and of a requisition from the Lords Commissioners of His Majesty's Treasury, authorizing the same: I hereby grant a Credit to the Lords Commissioners of His Majesty's Treasury for the time being, on Account of His Majesty's Exchequer at the Bank of , or on the growing Balance thereof, to the amount of £ on account of the charge of the Consolidated Fund in Great Britain (or Ireland, as the case may be), for the quarter ended , 19 , remaining unpaid at that date.

Exchequer & Audit Department
19 . } *Comptroller & Auditor-General.*

To the Governor & Company of the Bank of .

---

§ 8. Treasury Order for Issue from the Exchequer Account for Supply Services.

Supply Services.

Year 19 .

Treasury, Whitehall,
19 .

Gentlemen,

Under the authority of the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39, s. 15), and of the Credit granted to the Lords Commissioners of His Majesty's Treasury, by the Comptroller and Auditor-General, on the Account of His Majesty's Exchequer at the Bank of England, under the provisions of the said Act: I am commanded by the Lords Commissioners of His Majesty's Treasury to request that you will transfer the following sum, on the inst., from the said Account to the Account of in your books, on account of the Supply Service undermentioned:—

Supply Service.	Amount.
	£ s. d.

I am to request that when this sum shall have been trans-

ferred accordingly, you will transmit this authority to the Comptroller and Auditor-General.

I am, Gentlemen,
Your obedient Servant,

To be signed by one of the Secretaries of the Treasury.

To the Governor and Company of the Bank of England.

---

§ 9. Treasury Order for Issue from the Exchequer Account for Consolidated Fund Services.

Consolidated Fund Services.

Quarter to 19 .

Treasury, Whitehall,
19 .

Gentlemen,

Under the authority of the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39, s. 13), and of the Credit granted to the Lords Commissioners of His Majesty's Treasury, by the Comptroller and Auditor-General, on the Account of His Majesty's Exchequer at the Bank of England, under the provisions of the said Act: I am commanded by the Lords Commissioners of His Majesty's Treasury to request that you will transfer the following sums, on the inst., from the said account to the

in your books,
on account of the charge of the Consolidated Fund in Great Britain for the above-mentioned Quarter.

Service.	Amount.
	£ s. d.

I am to request that when these sums shall have been transferred accordingly, you will transmit this authority to the Comptroller and Auditor-General.

I am, Gentlemen,
Your obedient Servant,

To be signed by one of the Secretaries of the Treasury.

To the Governor and Company of the Bank of England.

WAR OFFICE

Letters Patent Constituting the First Army Council.

Edward the Seventh, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India: To Our right trusty and well-beloved Councillor A.B., Our trusty and well-beloved C. D., E. F., G. H., I. K., M. N., P. Q., Greeting.

KNOW ye that We, trusting in your wisdom and fidelity, of Our special grace, do by these presents constitute and appoint you to be Our Army Council for the administration of matters pertaining to Our military forces, and the defence of Our Dominions, with such power and authority for the purpose as has hitherto been exercised under Our prerogative by Our Secretary of State for War, Our Commander-in-Chief or other Our principal Officers who have, under Our Secretary of State for War, been charged with the administration of the Departments of the Army.

And We do command all Our Officers of Our military forces and all others in any department of Our Military Service, that they may be attendant on you and observe and execute all such orders as you may give in the exercise of your power and authority.

And know ye that we do grant unto you full power and authority from time to time to appoint such Officers for conducting the civil business of Our Military Service entrusted to you as shall seem necessary to you, and to revoke the appointment of any such officers as you shall see fit, and appoint others in their place, and We enjoin all such officers and others whom it may concern to be obedient to you in all things as becometh.

And We grant unto you full power in relation to any power and authority for the time being vested in you under these Our Letters Patent to make such contracts and do all such other things as you may find necessary in your discretion for the better carrying on of Our Military Service, and generally to execute and to do every power and thing which formerly appertained to our Secretary of State for War, or to Our Commander-in-Chief or other principal Officers as aforesaid.

And know ye that your powers may be exercised and your duties performed by any three of your number, that Our trusty and well-beloved Councillor A. B. [the Secretary of State for War for the time being] shall be your President, and that any document may be signed on your behalf by any two of you and such person as you may appoint to be your Secretary.

In witness whereof We have caused these Letters to be made Patent.

Witness Ourself at Westminster this day of in the year of Our Reign.

By Warrant under the King's Sign Manual.

MUIR MACKENZIE.

INDEX

A.

Accounts, Public:
audit of, 136, 137, 139, 143, 146.
appropriation, 148, 156, 157.
statement of, 147, 148, 156–7.
Committee of, 157.
Consolidated Fund, 152.
finance, 152, 156.
are cash accounts, 160.
Act of State:
ministers' responsibility for, 81, 84, 300, 302.
Acts of Uniformity, The, 231, 232.
Addington, Mr. Henry:
Clerk of the Pells, 141.
Aden:
peninsula of, how governed, 89.
Adjutant-General, 204, 207.
Admiralty, Board of:
relations with Home Office, 21.
Ascension Island governed by, 59, 90.
how concerned with Royal Marines, 173.
numbers of naval force determined by requirements of, 183.
as compared with Army Council, 206, 213, 214.
how constituted, 211, 212.
Secretaries to, 212.
the Sea Lords, 212.
Civil Lord of, 212.
its duties, 211, 212.
— how distributed, 213.
its responsibility for advice, 212, 214.
relations with War Office, 215.
Admiralty, Court of: *see* **Court.**
Admiralty, First Lord of, 83, 207, 210, 212.
entitled to share of money for secret service, 20.
his relation to Board, 213.
his responsibilities, 212–13.
Adoptive Acts, 32 and *n.*
Africa:
protectorates in, 92.
powers of High Commissioner for South Africa, 65, 94.
sphere of influence in, 94.
Africa:
Companies in, 94.
Orders in Council for, 92, 93.
jurisdictions in, 112, 192.
West Coast Colonies, how governed, 61, 65.
disputes in Church of South Africa, 248–9, 295.
Agriculture, Board of:
duties transferred from Home Office, 28.
powers under Small Holdings Act, 38.
responsible for survey of United Kingdom, 192.
Aid, 125–6.
Alberta, 72.
Alderney, 57, 152.
Alexandra, Queen:
crowned by Archbishop of York, 235.
Alien:
a man born in a protectorate is an alien, 60.
Allegiance:
Oath of, candidates for ordination required to take, 232.
Althorp, Lord:
Chancellor of the Exchequer, 149.
Ambassador:
mode of appointment, 99.
privileges and immunities, 99–101.
Anglo-French Convention, 107.
Anglo-German Agreement:
as to African sphere of influence, 94.
Anne, Queen:
her civil list, 120, 134, 163, 164.
foreign postage in reign of, 131 and *n.*
restrained from alienating Crown lands, 135.
surrendered first-fruits and tenths, 239.
Antiqua custuma, the, 115.
Appeal: *see* **Court.**
ecclesiastical, how provided for, 223.
to Crown in Council, 77, 286–91.
Lord of, 291, 292, 295.
Appellate Jurisdiction Act (1876), 7, 269, 284, 286, 289, 292.

Appropriation:
of supply, 143.
accounts, 148, 156, 157.
Act, 113, 154, 155.
Archbishop of Canterbury:
summons Convocation of his Province, 225, 226.
mode of summons to, 225.
presides in Upper House, 227.
receives licence to make canons, 229, 230.
— to consecrate Colonial bishops, 249.
his dignity and precedence, 234, 235.
is appointed by the Crown, 235.
his Courts, 279.
his official principal, 280.
Archbishop of York:
summons Convocation of his Province, 226.
mode of summons, 226.
his precedence and claims, 235.
his official principal, 280.
Archdeacon:
forbidden to hold pleas in secular court, 219.
his Court, 219.
his duties, 226, 236.
his summons to Convocation, 226.
his jurisdiction, 233.
how appointed, 236.
Arches, Court of: *see* **Court.**
Dean of, 260, 279.
why so called, 279.
Armour, Statutes of, 169.
Army Act, 173, 174, 189.
substituted for Mutiny Act, 172, 175, 182.
legalizes standing army, 182–3.
forces governed by, 172.
contains a code of military law, 182, 186.
Army Board, 206.
Army Council, 206, 208, 209, 210, 211, 214.
composition of, 207.
Army Regulation Act (1871), 178.
Army, Standing:
reluctance to recognize, 168, 171, 190.
legal obstacles to, 170, 171.
how legalized, 172, 181, 208.
how composed, 172, 173.
how recruited, 167, 169, 170, 174.
officer in, how appointed, 176.
discipline of, 170.
liabilities of soldier, 185.
government of before 1855, 189–98.
royal prerogative in respect of, 181, 193, 209.
Army, Standing:
estimates for, 152, 153, 154, 209, 215.
expenditure on, 157.
Paymaster of, 148, 161.
terms of enlistment in, 175.
Array, Commissioners of, 169.
Articles of Religion:
sanctioned by Parliament, 218.
define doctrine, 222, 231.
assent to, when required, 232.
Articles of War:
Indian, 172.
for Army, 181.
for Navy, 185.
Ascension:
Island of, 59, 89.
Ashanti, 65.
Assembly:
representative, in the Colonies, 64, 67, 72.
Assembly, General:
of Scotch Church, 241, 242.
Assessed Taxes, 122, 130.
Assessment:
of property for taxation, 128.
Assize, Commissions of, 162, 261–2.
Attorney-General, 266.
his fiat for Petition of Right to proceed, 19.
for Ireland, 302.
Audience, Court of:
for personal jurisdiction of archbishop, 280.
Audit:
of accounts, 136, 137, 143, 146, 149, 156–8.
in Upper Exchequer, 139.
Board of, 147, 149.
Auditor:
of Receipt, 141, 144, 148.
of Imprest, 146, 161, 162.
— abolished, 147.
of civil list, 165.
Australia, Commonwealth of, 69, 70, 71.
its constitution compared with Canadian, 73.
right of appeal to Crown from High Court of, 289.
Australian Commonwealth Constitution Act, 72, 289, 290.
Australia, South, 69, 70.
Australia, Western, 69, 70.
Austrian Succession, War of:
increased import duties during, 118.
Auxiliary Forces, 172, 177.
Auxilium:
a direct tax, 126.

B.

Bahamas:
constitution of, 64, 67.
Bailiff:
of Jersey, 52–6.
of Guernsey, 56–7.
Balfour, Mr.:
on treaty-making prerogative, 107.
Bank: of England—of Ireland:
Exchequer account at, 137, 148, 149, 156, 162.
public money paid into, 138, 148, 149, 150, 159.
— how issued from, 148, 154, 155.
— how used till wanted, 150, 162.
Bankruptcy:
jurisdiction in, 265.
appeals in, 267.
Bankruptcy Act (1883), 265.
Barbadoes:
constitution of, 64, 67, 68.
its executive Committee, 68.
Baron:
of Exchequer, 139, 146, 259.
Basutoland, 65.
Bate's Case, 117.
Bathurst, Lord:
Teller of Exchequer, 141.
Beaufort, Sir Thomas:
Lord High Admiral of England, 184.
Bechuanaland, 65, 93.
Berlin Conference, 92.
Bermuda, 64, 67.
Bill of Rights:
as to taxation, 127.
as to standing army, 171, 174.
recited in Army Act, 182.
Birrell, Mr. A.:
on Irish administration, 13 *n.*
Bishop:
appointed by Crown, 218, 238, 249.
Court of, 219, 223, 277.
forbidden to hold pleas in hundred court, 219.
his mandate to attend Convocation, 226.
a member of Upper House in Convocation, 227.
duties and powers of, 233, 234, 235–6.
jurisdiction of, 247.
consecration of, how authorized, 247, 249.
suffragan, 236, 249.
Indian, 247, 249.
Colonial, 247.
— form of appointment of, 249.
Missionary, 250.
Blackstone, Sir W.:
on prerogative of Crown in making Treaties, 104.
Board:
Admiralty: *see* **Admiralty.**
Army, 206.
of Agriculture: *see* **Agriculture.**
of Education: *see* **Education.**
of Guardians: *see* **Guardians.**
Local Government: *see* **Local Government.**
Poor Law: *see* **Poor Law.**
of Public Health: *see* **Public Health.**
of Trade: *see* **Trade.**
of General Officers, 190, 198.
Bombay:
Governor of, 84, 86, 87, 88, 89.
Aden and Island of Perim, governed from, 89.
Book of Common Prayer:
Statutes regarding, 227, 231–2.
Borneo, North:
Protectorate over, 60 *n.*, 91, 92.
Borough: *see* **Town.**
early history of, 40.
municipal, 40, 41, 42, 49.
compared with urban district, 42.
relation to county government, 43.
meanings of terms, 44.
taxation of, 127.
Bounty, Queen Anne's:
source of, 239.
mode of distribution, 239.
Bowen, Sir George:
Governor of Victoria, 78 *n.*
Brett, J.:
judgment in *Parlement Belge* case, 100.
Britain, Great:
result of Union with Scotland, 5.
British Columbia, 72.
British Guiana, 67.
British North America Act, 72.
British Resident:
in Native States of India, 91.
in Malay States, 92.
in Egypt, 92.
British Settlements Act, 61, 76, 283.
British South Africa Company:
its powers under Charter, 94.
under Orders in Council, 63 *n.*, 94.
Brunei, Sultanate of:
protectorate over, 63, 64, 91, 92.
Burke:
his financial legislation, 162.
his military legislation, 194.

Business, Letters of:
addressed to Convocation, 228, 229.
Butlerage:
part of hereditary revenues of Crown, 116.

C.

Cabinet, 98, 153, 209.
representation of Army and Navy in, 214, 215.
committee of, 152, 154, 214.
estimates considered by, 194, 208.
responsibility to Parliament, 208, 214.
minutes of, 215.
of self-governing colony, 71.
Caicos Islands, 66.
Calcutta, 87.
Camden, First Lord:
judgment in *Entick* v. *Carrington*, 82 *n.*, 300.
— **Second Lord:**
as Teller of Exchequer, 141.
Canada:
Dominion of, 68, 69, 289.
gradual growth of responsible government in, 69.
federation of, 72.
provinces of, 72, 73.
bicameral government in, 71.
its constitution compared with Australian Commonwealth, 73.
right of appeal to Crown from Supreme Court of, 289.
Canterbury: *see* **Archbishop.**
Convocation of, 225–32.
Province of, 229, 230, 233.
archiepiscopal diocese of, 233.
Cape Colony:
colony of, 69.
responsible government in, 70.
appeals from Supreme Court of, 291.
Capetown:
Bishop of, 248.
Cardwell, Mr. Secretary, 199, 200, 202.
Carucage:
a tax on land, 126.
Cathedral, 44, 233.
Central Criminal Court:
establishment of, 263.
Certiorari:
writ of, 187, 265, 275.
Cession of territory:
how far a prerogative of the Crown, 103–8.
effect on rights and duties of inhabitants, 108.
Ceylon, 66.
Chamberlain:
of Exchequer, 139, 147.
duties of, 141.
Lord Great Chamberlain, 139.
King's Chamberlain, 139.
Chancellor, Lord, 35, 266, 288, 294, 295.
appoints Justices of Peace, 39, 271.
once an officer of Exchequer, 139.
presides in the Chancery, 259, 268.
is *ex officio* a Judge of Appeal, 269.
and County Court judges, 270.
a Lord of Appeal, 291.
Chancellor:
ecclesiastical, 277.
Chancellor of Exchequer: *see* **Exchequer.**
Chancery: *see* **Court, King.**
its growth as a court, 255–6.
jurisdiction and judges, 256, 258, 259.
court of Appeal in, 260.
merged in High Court of Justice, 265.
Chancery Division:
of High Court, its business, 267.
Channel Islands:
their relations with Home Office, 19.
their constitutions, 51–8.
in diocese of Winchester, 58.
distinguished from colonies, 59.
appeals from, 287.
Chapter:
summons of, to Convocation, 226, 227.
duties of, 233, 234, 277.
how appointed, 234, 238.
Chargé d'affaires:
mode of appointment, 99.
immunities of, 99–101.
Charles I:
taxation by, 127.
his postal arrangements, 131.
his control of militia disputed, 169, 178.
first put office of Lord High Admiral into commission, 184.
Charles II:
institution of Excise and Post Office under, 115, 119, 131.
grant of customs to, 118.
resettlement of revenue on Restoration of, 119.
scheme of taxation under, 128.
appropriation of subsidies granted to him, 142, 143, 160.
troops maintained by, 171.

Charles II:
Board of Ordnance reorganized in reign of, 191.
office of Secretary at War dates from, 192.
Charter:
of pardon, 27.
to towns, 40, 41.
granted on advice of Privy Council, 41.
for colonial government, 58.
of East India Company, 82.
of Companies in Africa and Borneo, 92, 93, 94.
of Levant Company, 111.
Chartered Company:
British South Africa, 63 *n.*, 94.
Royal Niger, 63 *n.*
of North Borneo and Sarawak, 92, 93.
Levant Company, 111.
Chefs Plaids:
in Guernsey, 56, 57.
Church Discipline Act (1840), 278, 292.
Church, English Established:
relations with State, Saxon, 219; Norman, 219–20; pre-Reformation, 221.
how affected by Reformation, 222.
relations with Home Office, 18, 229.
in the Channel Islands, 58.
in what sense established, 218, 222, 245, 246.
the King in what sense its head, 218, 222.
its doctrines, where embodied, 231.
property of, 238–40.
Courts of, 275–81.
Scotch Presbyterian established, 232, 241.
mode of government, 241–2.
its relations with State, 242–3.
of Scotland, Free, 243, 247.
its legal troubles, 244.
Irish:
disestablishment of, 245–6.
comparison with Scotch, 246.
and with English, 246.
Indian, 247.
Colonial:
royal prerogative in relation to, 247.
Cinque Ports:
responsible for narrow seas, 184.
Circuit:
Commissions for, 261, 262, 269, 272.
system of, how altered, 269.
City:
meaning of term, 43.
Civil List:
hereditary revenues of Crown formerly included in, 134, 143.
charges on, 161.
meaning of term, 163.
history of, 163–6.
deductions from, 163.
apportionment of, 164.
present Civil List, 165.
pensions, how paid, 165.
Auditor of, 165.
Civil Service:
how paid, 120, 161.
estimates for, 152, 154.
control of Treasury over salaries, 153.
accounts of, 157.
Civil Service Contingencies Fund, 159.
Civil Service of India, 86.
Clarendon:
Constitutions of, 220, 221.
Clergy:
subsidies granted to Crown by, 128.
their immunities, 220, 237.
— representative assemblies, 221, 227.
— disabilities, 237.
their estates separately taxed, 221.
subject to ecclesiastical law, 231, 237, 276, 278, 279.
beneficed and unbeneficed, 237.
Clergy Disabilities Act, 237.
Clergy Discipline Act, 237, 279.
Clerk:
to the Justices, 24.
of the Crown, 35.
of the Council, 35, 39.
of the Peace, 24, 37, 39.
Coke, Sir E.:
on prerogative as to new jurisdictions, 296.
Cockburn, Sir A.:
on prerogative as to cession of territory, 105.
on Petition of Right, 299.
Colenso, Bishop, 248, 291.
Colonial Courts, 69, 71, 73, 74, 283, 290, 291.
Colonial Forces, 172.
Colonial Government:
forms of, 58–82.
Colonial Laws Validity Act (1865), 78, 296.
Colonies:
Secretary of State for, 14, 58, 69, 74, 94, 190.

Colonies:
Secretary of State for, formerly also for War, 59, 196, 197.
— responsible for exercise of royal prerogative as to Colonies, 1, 59, 64, 76.
— and for nearly all protectorates, 59.
Colony:
definition of, 59.
Crown, 60–8.
self-governing, 60, 68–75.
federated and self-governing, 72–5.
compared with a protectorate, 60, 64.
forms of government common to both, 64.
forms of Crown Colony government, 64–67.
federation of in Canada and Australia, 72.
general principles of government in, 75–8.
Commander-in-Chief, 188, 210, 211.
creation of office, 194.
his duties, 189, 203, 204, 205.
his relations with Secretary at War, 194–6, 197.
— with Secretary of State for War, 199, 200, 203, 205.
Lord Wolseley's view of office, 205.
in India, a member of the Council, 88.
office abolished, 206.
Commissariat:
a department of the Treasury, 190, 191, 196.
handed over to War Office, 196, 198.
Commission:
of Peace, 42, 43, 271–4.
of Array, 169.
Ecclesiastical, 239.
of Assize, 232, 265.
of Oyer and Terminer, 232, 263, 265, 266.
of Gaol Delivery, 232, 263, 265, 266.
of *nisi prius*, 232, 263.
for executing office of Lord High Admiral, 211–13.
of colonial governor, 78, 305, 306, 312.
of officer in army, 176.
Commissioners:
of Police, 23.
of local improvements, 46.
of Public Accounts, 118, 146, 161, 162.
of Woods and Forests, 137.
Commissioner:
of Audit, 198.
Ecclesiastical, 282.
resident, for Colony or Protectorate, 65.
on circuit, 269.
for North-West Territories, 72.
for Indian Provinces, 89.
for assembly of Scotch Church, 242, 243.
Commissioner, High:
for South Africa, 63, 94.
for Western Pacific Islands, 64, 65, 90.
for Northern Nigeria, 65.
for Cyprus, 67.
Commissioners Clauses Act, 46.
Committee:
Judicial of the Privy Council, 243, 275, 284, 288, 290, 293, 295.
— jurisdiction of, 288–90.
— its composition, 291–2.
for Trade and Plantations, 287.
of Cabinet, 214.
of House of Commons:
of Supply, 154.
of Ways and Means, 154.
of Public Accounts, 138, 157.
Standing Joint, for County, 39.
Commons, House of, 138.
in relation to supply, 154.
— to public accounts, 157.
— to army, 173, 208, 209.
Commonwealth, The:
mode of taxation under, 119–20, 128.
armies before the, 169–70.
fear of army created by, 168, 171.
of Australia, 72.
—its constitution compared with Dominion of Canada, 73.
its judicature, 289, 290.
Company: *see* **Charter.**
Comptroller and Auditor-General:
how appointed, 151.
tenure of office, 151, 304.
his duties, 137, 138, 155–7, 166.
superseded Audit Board, 147.
and Auditor of Receipt and Clerk of Pells, 148.
Concilium, Commune:
restrictions on King by, 124, 126.
its summons compared to that of feudal levy, 168.
Confession of Faith:
of Scotch Church, 241.
Confirmatio Chartarum, the, 126.
Consolidated Fund:
institution of, 147.
charges on, 116.

Consolidated Fund:
revenue from customs paid into, 118, 137, 149, 150.
revenue from excise duties paid into, 120, 121, 137, 149, 150.
revenue from Post Office paid into, 131, 137, 149, 150.
revenue collected by Commissioners of Woods and Forests paid into, 137, 149, 150.
nothing paid from except by authority of Parliament, 137, 150.
Services, 150, 151, 156, 162, 319, 320, 322.
accounts of Consolidated Fund Services, 152.
all revenue finally paid into, 137, 147, 150, 160.
payments to royal family transferred to from Civil List, 165.
Civil List pensions paid out of, 165.
Consolidated Fund Act, 120, 154.
Constable, Lord High, 181.
in Channel Islands, 53, 54 and *n.*, 57.
Consul:
his duties, 101, 102.
how far judicial, 102.
immunities of, 102.
Controller:
of Navy, 212.
Controller-in-Chief:
of supply and transport, 199.
Convict prisons, 25.
Convocation:
before Reformation, 221.
Articles of Religion formulated by, 223.
submission of, 224, 225.
how summoned and composed, 225-7.
its legislative powers, 227, 230-1.
and procedure, 227-31.
Cornwall, Duchy of:
belongs to eldest son of reigning sovereign, 133.
Coroner:
his election transferred to County Council, 34, 36.
his duties, 35, 36.
Corporation:
municipal, 36, 44, 48.
sanitary, 33.
ecclesiastical, 238, 245.
Council, Army, 83.
Council, Privy: *see* **Privy Council.**
Council:
of India, 82-9.
of Governor-General, 88.
of Presidencies, 89.
of Isle of Man, 50.
Council:
Colonial: legislative, 64, 65, 66, 67.
— executive, 66, 67, 68.
County, 32, 33, 36.
— its relation to central government, 36, 39.
— its composition, 36.
— qualification of elector, 36.
— its duties, 37-9.
— is the Local Education Authority, 37, 38.
— the authority for Small Holdings, 38.
District, 32, 33, 39, 48.
Parish, 32, 39.
Town, 46, 47.
Council, for Trade, 58, 59.
County:
administrative, 34, 36 and *n.*, 43.
of a borough, 36 and *n.*, 43, 44.
corporate, 44.
Council: *see* **Council.**
County Association:
for Territorial Force, 180.
County Electors Act (1888), 37.
Courts:
of England—
Saxon and feudal, 253.
at Westminster, 3, 4.
of King's Bench, 4, 35, 48, 254, 255, 257, 258, 261, 265, 266, 267.
of Common Bench or Pleas, 4, 254, 258, 265, 267.
of Exchequer, 177, 188, 254, 258, 265.
of Chancery, 255, 256, 259.
of Admiralty, 184, 257, 258, 259, 265, 268, 283-4.
of Probate and Divorce, 257-9, 260, 265, 268, 280.
Criminal, 261, 265, 266, 271-2.
— for Crown cases reserved, 263, 266.
— of Criminal Appeal, 28, 29, 266, 267, 284.
Appellate—
— Exchequer Chamber, 188, 258, 260, 263, 265.
— in Chancery, 260.
Supreme Court of Judicature, 264-9.
— Jurisdictions merged in, 252-64.
— Divisions of, 265, 287.
— Judges of, 268, 271.
High Court of Justice, 35, 187, 265, 266, 269, 271, 273, 275, 285.
— Court of Appeal, 265, 267.
of Final Appeal, 275, 281, 284-6, 294.
of the House of Lords, 284-6, 291-4.

Courts:
of King in Council, 286-7.
of Judicial Committee of Privy Council, 288-9.
— in Colonial appeals, 289, 290.
of Petty Sessions, 39, 272.
of Quarter Sessions, 24, 39, 43, 271, 272, 273, 275.
County, 30, 34, 270.
Ecclesiastical, 218-21, 257, 259, 275, 281.
— of Archdeacon, 277.
— Consistory, 277.
— of Arches, 223, 260, 279.
— of Audience, 280.
— of Archbishop, 279, 280.
— Prerogative, 280.
— of Delegates, 224, 288.
of Wales, 3, 4.
of Scotland, 281-2.
— of Session, 281-2.
— Jury Court, 281.
— of Exchequer, 6, 135, 281, 285.
— of Teinds, 6, 7, 281, 285.
— of Admiralty, 282.
— of Justiciary, 282.
— the Sheriff's, 282.
of Ireland, 13, 282-3.
Colonial, 283, 290, 291.
of India, 87, 89, 106, 283.
of the Constable and Marshal, 181.
Courts-martial, 181, 182, 184, 185, 186, 187, 188, 275, 284.
of the Channel Islands, 52, 56, 57, 287.
of Tynwald (Isle of Man), 50, 51.
of Lord High Steward, 274, 284.
of Lord Warden of Stannaries, 267.
of the hundred, 219
of Requests, 270, 296.
of Star Chamber, 286, 295.
of Policy (British Guiana), 67.
Credence:
Letter of, 99.
Crimean War:
and army administration, 189, 196.
Criminal Appeal Act, 27, 264, 266, 272.
Criminal Law:
how different from Civil Law, 252.
administered by Courts-martial, 185-7.
— in Court of Admiralty, 261.
— in King's Bench, 261.
— under Commissions, 261, 269.
— by High Court, 267, 272.
— by Justices of Peace, 272.
— by Court of Justiciary (Scotch), 282.
appeal in, 27, 28, 272.
Criminal lunatics, 25.
Cromer, Lord, 96.
Cromwell, Oliver, 171.
Crown: *see* Prerogative.
succession to under Act of Union with Scotland, 4, 5; with Ireland, 2.
in Council, 8, 41, 53, 54, 56, 57, 58, 60, 62, 75, 76.
— addressed through Home Secretary, 16.
— approves laws of Isle of Man, 50.
— — of Channel Islands, 52.
— — of Colonies, 60-8, 79.
legislative powers in, for colonies, 61, 62, 65, 76.
in protectorates, 60, 62, 63, 92, 93.
possesses veto on Colonial legislation, 75, 76.
territories leased to, 95.
its representative character, 97.
makes war and peace, 103.
doubts as to right to cede territory, 103-8.
hereditary revenues of, 113, 120, 121.
may not levy taxes, 126.
lands, 133-5.
all public money granted to, 155.
prerogative of in discharge of soldier, 175.
— in government of army, 182.
relations of Established Church to, 217.
appoints great officers of Church, 218.
grants 'Letters of Business' to Convocation, 228.
the Courts and, 251-304.
appeal to, in Council and in Parliament, 284, 286, 287, 290, 293.
legal irresponsibility of, 295-304.
tenure of servants of, 304.
Crown Lands:
revenue from, 114.
history of, 133-5.
Crown Office, 18.
Cuming:
ex parte-case of Lieutenant Hall, 176.
Curia in Banco, 254.
Curia Regis:
the beginnings of Court of King's Bench, 253-4.
gradual break up of, 255.
Customs:
Duties, 115-19.
revenue from, 114, 137.
origin of, 115.
consolidation of in 1660, 117.
in 1787, 118.

Customs:
reduction of in 1843, 119.
entire revenue from paid into Consolidated Fund, 118.
advances made by collectors of, 159.
Custos Rotulorum, 35, 271.
Custuma:
antiqua and *nova*, 115.
Cyprus:
how governed, 67, 95.

D.

Danegeld, 125.
Deacon, 234.
Dean:
of the Province, 226.
of Chapter, 226, 227, 234, 277.
how appointed, 236.
Death duties, 122, 123, 130.
Declaratory Act, 9, 286.
Delegates: *see* **Court.**
Demesnes of Crown:
King's right to tax, 126.
of Saxon kings, 133.
Dependent States:
Indian, 91, 112.
around Straits Settlements, 91–2.
Deprivation, 237.
Diocese: *see* **Bishop.**
its divisions, 233.
Diplomatic agents:
kinds of, 98.
forms of appointment, 99.
immunities of, 99–101.
Dispensing power:
prerogative of mercy, a form of, 26.
Dissent:
of Bailiff in Jersey to legislation, 54.
Divorce:
Court of, 257, 259, 260, 261, 265, 268, 280.
Doleance, 287.
Dominion of Canada: *see* **Canada.**
Donum, 126.
Douzenier:
in Guernsey, 57 and *n.*
Dundas, Sir David:
and Lord Palmerston, 195.
Durham:
Court of Pleas at, 264, 265.
Duty:
of customs, 115–19.
of excise, 119–22.
Estate, 122.

E.

Ealdorman:
his position and duties, 219.
East Africa Protectorate, 66.
Ecclesiastical and Church Estates Commission, 239.
Ecclesiastical Law:
how made, 227.
how enforced, 237, 278–9.
how administered, 275–81.
Education:
duties of local authorities in regard to, 29, 38.
Board of, 37, 38, 49.
Education Act (1902), 37.
Edward I:
annexation of Wales by, 2.
export duties granted to, 115.
nova custuma first imposed by, 115.
his armies, how raised, 169.
Edward II, 169.
Edward IV, 134.
Edward VII:
hereditary revenues of, 121 *n.*
civil list of, 165.
coronation of, 235.
Egypt:
armed occupation of, 95, 96.
Convention with France concerning, 96.
government of, 96.
Eldon, Lord:
Lord Chancellor, 256.
Elizabeth:
sales of Crown lands by, 134.
systematic audit in reign of, 146.
her Act of Supremacy, 222.
Enlistment:
in army, terms of, 175.
forms of, 175.
in navy, 183.
Envoy plenipotentiary:
mode of appointment, 99.
immunities of, 99.
Equity:
beginnings of, 256.
Establishment:
licences, 122.
Establishment:
of Church in England, 218, 232, 246.
of Church in Scotland, 241, 243.
Estate Duty:
as a source of revenue, 114.
explanation of term, 122.
Estimates:
when presented, 152.
how settled, 152, 208.
supplementary, 158.
États de déliberation:
in Guernsey, 57.
États d'élection:
in Guernsey, 57.

Excess vote, 158.
Exchequer:
of Receipt, 138, 139.
of Account, 139.
the Norman, 139.
— officers of, 139, 140, 141; abolished, 148.
a Common Law Court, 139, 255, 258.
with equitable jurisdiction, 257, 258.
Barons of the, 139, 146, 264.
ancient process of, 140.
course of, 142, 143, 144, 145, 146, 148.
as now constituted, 136, 137, 150.
account of, at Banks of England and Ireland, 137, 149, 156.
all revenue paid to, 137, 148, 149, 150.
all payments made from, 160.
parliamentary control of, 142, 150.
issues of money, how authorized, 151, 155, 317–322.
Exchequer:
Chancellor of, character of his duties, 142, 147, 149, 152, 153, 183, 195.
— his control of estimates, 152.
Exchequer and Audit Act, 147, 149, 150, 151.
Exchequer Court: *see* **Court**.
Excise, 114.
under the Commonwealth, 119.
resettlement at Restoration, 119.
the hereditary excise, 120.
— — commuted for annual payment, 120, 121 and *n.*
— — income from carried to Consolidated Fund, 121.
use of the term, 121.
Walpole's Excise Bill, 121.
licences, term extended to, 121–2.
Excommunication, 231.
Executive: *see* **Cabinet, Crown, Council**.
in colonies, 64, 65, 66, 67, 68, 71.
its responsibility as to treaties, 106.
Exequatur:
of Consul, 102.
Explosives Act, 28.
Export Duty, 115–19.
Extradition Acts of 1870, 1873, and 1895, 21, 22.
Extradition treaties:
duties of Home Office in respect to, 21–2.
need approval of Parliament, 103.

F.

Factory:
Acts, Home Office concerned with, 16, 28, 29.
for materials of war, 191, 201.
Falkland Islands, 291.
under British Settlements Act, 61.
appeals from, 291.
Federation:
of Canadian colonies, 72.
of Australian colonies, 72.
Fee fund, 162.
Fees:
public servants paid by, 141, 162.
Feorm Fultum, 125.
Ferm, 125.
Feudal aid, 126.
Feudal levy:
its liabilities, 167, 168.
how summoned, 168.
Feudalism:
extended rights of the Crown over land, 133.
Fiat:
in procedure by Petition of Right, 19, 299.
Fiji, 65, 66.
Finance Accounts, 156.
Financial year, the, 149, 154, 157, 160.
Fitzwilliam, Lord, 10.
Folkland, 125, 133.
Forces:
military, their history, 167.
regular, 172, 173.
auxiliary, 177.
territorial, 177.
reserve, 177.
Foreign Affairs:
Secretary of State for, 97, 98, 99.
Foreign Enlistment Act, 20.
Foreign Jurisdiction Acts, 22, 59, 60, 62, 63, 92, 93, 95 *n.*, 111.
Foreign Office:
responsible for some protectorates, 60 *n.*, 63, 93.
staff of, 97.
its procedure, 97.
library of, 98.
Representatives abroad responsible to, 98, 102.
Fortifications:
under charge of Ordnance Board, 191, 192.
Inspector-General of, 204, 205, 207.
Fox, Henry (Lord Holland):
Paymaster of the Forces, 161.

Free Church, Scotch, 243, 247.
admits United Free Church to membership, 244.
dispute regarding property of, 244.
Fugitive Offenders Act, 22.
Fyrd, the, 168.

G.

Gambia, 65, 66.
George I:
civil list of, 163, 164.
George II:
civil list of, 164.
George III, 120.
civil list of, exclusive of Crown lands, 135, 164.
George IV:
civil list of, exclusive of hereditary revenues, 135.
Gibraltar, 65.
Gladstone, Mr.:
on treaty-making prerogative, 107–8.
Gold Coast, 65, 66.
Gordon, General, 96.
Goschen, Mr.:
on treaty-making prerogative, 107.
Governor:
of colony represents Crown, 60, 64, 68, 78.
how appointed, 61, 78, 305–8.
his position under various forms of colonial government, 64, 65, 66, 67.
his duties, 70, 71.
acts on advice of his ministers, 71, 73, 74, 79.
his veto on legislation, 73, 75, 78
office constituted and powers defined by Letters Patent, 78, 309.
duties set forth in Instructions, 61, 71, 75 *n.*, 78, 79, 81, 313.
his executive powers, 78.
his part in legislation, 78.
his prerogative of mercy, 79.
appoints to vacant offices, 79.
his powers in Crown colonies and Self-governing colonies, 79–80.
his legal liabilities, 81, 302.
Governor-General:
of Canada, 73, 74.
of Australia, 73.
of India, 83, 84, 86–9.
of Soudan, 96.
Governor, Lieutenant:
of Isle of Man, 50.
of Jersey, 53.
of Guernsey, 56.
of Canadian provinces, 73.
Governor, Lieutenant:
of Australian States, 73.
of Indian Presidencies, 84, 89.
Graham, Sir James:
at the Home Office, 20 *n.*
Gray, Bishop, 248.
Grenada, 66.
given representative government, 77.
constitutional difficulties, *Campbell* v. *Hall*, 76, 77.
surrender of its constitution, 62.
Grenville, Lord:
Auditor of Receipt, 141, 144, 145, 146.
Prime Minister, 145.
Grey, Earl:
Colonial Secretary, 69.
Guardians, Board of, 31, 33, 42, 47.
Guernsey:
institutions of, 51, 52.

H.

Habeas Corpus, Writ of:
in Isle of Man, 51.
in restraint of military courts, 187.
of ecclesiastical Courts, 237.
Hale, Sir M.:
on the functions of the Court of the Constable and Marshal, 181.
on the maxim 'the King can do no wrong,' 300.
Hall, Lieutenant:
case of, in resigning commission in Navy, 176.
Hartington, Lord:
commission on army administration, 203, 206, 214.
Health:
Public, 45–8.
Board of, 46.
Hearth-money, 128.
Heligoland:
cession of, 106, 108.
Henry I:
and the Church, 220.
Henry II:
his conquest of Ireland, 7.
his taxation, 125.
organized national levy, 168.
Henry IV:
Duchy of Lancaster his private property, 134.
Henry V:
method of raising an army under, 170.
Henry VII:
changes in Exchequer in reign of, 140.

Henry VIII, 239, 287.
his legislation for Wales, 3.
created lieutenants of counties, 35.
his legislation for the Church, 219, 222.
Hereditary Revenues: *see* **Revenue**.
High Court of Justice: *see* **Court**.
Home Office:
had charge of Scotch affairs, 6, 7.
its history, 14, 15.
its business, 16–27.
nature of its work, 18.
functions of Local Boards assigned to, 46, 47.
Home Secretary:
meaning of term, 15.
the usual medium of communication between Crown and subject, 16–19.
his duties, 14–29.
as to Scotland, 7.
— Ireland, 13.
— petition of right, 19, 299.
— naturalization, 19.
— Isle of Man, 19.
— Channel Islands, 19.
— secret service money, 20.
— Post Office and Telegraph, 20 and *n.*
— extradition, 21, 22.
— Fugitive Offenders Act, Territorial Waters Jurisdiction Act, and Foreign Jurisdiction Act, 22.
— police, 22, 23.
— Recorders, 24.
— stipendiary magistrates, 24.
— prisons, 24.
— prerogative of mercy, 26, 27, 267.
— health, safety, and general well-being, 28.
his Under-Secretaries, 16 *n.*
reasons for his miscellaneous duties, 18.
form of address to sovereign by, 18 *n.*
may commit persons charged with treason, &c., 21.
Local Authorities' by-laws submitted to, 37, 42.
control of Militia taken from, 178.
once responsible for Reserves and forces on Home Establishment, 189, 190.
Honduras: 65 *n.*, 66.
constitution of, 62.
Hong Kong, 56.
Horse Guards:
dual control of army, with War Office, 194, 195.
House duty, 114, 130.
Hudson's Bay Company, 72.

I

Impeachment, 26, 27.
Imperial Defence Committee, the:
its origin, 214.
how composed, 215, 216.
its duties, 216.
Import Duty, 116–19.
Impressment:
for army, 170.
for navy, 183.
Improvement Clauses Act, 46.
Income Tax:
forms of, 130.
Incumbents' Resignation Act, 237.
India:
Secretary of State for, 16, 60 *n.*, 83–9, 303.
— — in Council, 85, 86, 87.
distinct from Colony, 59.
protected States of, 60 *n.*, 84, 91.
Emperor of, 83 and *n.*, 91.
Governor-General of, 83, 84, 86–9.
Government of, 83, 87–9.
Council of, 83, 84, 85, 304.
great officers for appointed by King, 84, 87.
provinces of, 89.
army of, 89, 172, 173, 174.
Courts of, 89, 106, 283.
India Office, 86, 87, 91.
Indian High Courts Act (1861), 283.
Industrial Schools:
control of by Home Secretary, 26.
Inland Revenue:
grant of licences by, 122.
department of, 137, 150.
Inspector-General:
of Fortifications, 204.
of Ordnance, 204.
Instructions:
to Colonial Governor, 61, 71, 79, 81, 313.
Interpretation of Terms Act, 15, 59.
Ireland:
Union with, 7, 12, 136, 286.
Lord Lieutenant of, 8, 9, 10, 11, 13, 14, 44.
— — his immunity from legal process, 13, 14, 81 *n.*, 302.
— — may open letters in Post Office, 20.
Parliament of, 8, 9, 10.
Privy Council of, 8.

Ireland :
legislative independence granted to, 9.
Treasury of, 10, 136.
Chief Secretary for, 10, 11, 44.
foreign policy of before Union, 11.
Courts of, 13, 14, 282–3 ; final appeal from, 285–6.
representation in House of Commons after Union, 13.
relations with England at and after Union, 12, 13.
administration of, by Boards, 13.
hereditary revenues of Crown in, 136, 164.
Bank of, 137, 156.
Church of, 245–7.
Wesleyan Methodists of, 247.
Ismail Pasha, 95.

J.

Jamaica, 66, 67.
James I :
effect of his accession on legal rights, 4.
import duties imposed by, 117.
taxation by, 127.
his postal arrangements, 131.
James II, 192.
his dealings with charters of towns, 40.
customs granted to, 118.
revenues of Post Office settled on, 131.
troops maintained by, 171.
Jersey :
government and institutions of, 52–6.
appeals from, to Crown in Council, 287.
Judges :
of Indian Courts, 87.
of English Courts :
before Judicature Acts, 259.
of Supreme Court, 268, 294.
how appointed, 268, 270.
tenure of office, 268, 297.
of Ecclesiastical Courts, 278, 279, 280.
of Scotch Courts, 281.
assistants in House of Lords, 294.
exemption from action against, 301.
Judicature, Supreme Court of : *see* Court.
Judicature Act :
English (1875), 254, 264, 266, 269, 289.
Irish (1877), 283, 286.
Judiciary Act (Australian, 1903), 290.
Jurat :
of Channel Islands, 52–3, 56–7.
Jurisdiction, Foreign :
history of, 111.
character of, 62, 92, 93, 95 *n.*, 111.
in consular courts, 111, 112.
process of creation, 112.
Jury :
for trial of civil suits, 262.
— of indictable offences, 262, 263, 271, 272.
in Scotch Courts, 282.
Justice of the Peace :
administrative work of county done by, 30, 31, 34.
powers of taken over by District Council and County Council, 33, 36.
duties of, 39, 271, 272.
connexion with central government, 39.
how appointed, 34.

K.

Keys, House of, 50.
Khedive of Egypt :
governs under suzerainty of Sultan, 95.
joint governor of Soudan, 96.
Kirk Session, 242.
King : *see* Crown *and* Prerogative.
his title in official documents, 1.
his command cannot excuse a wrong, 82, 300.
'to live of his own,' 124.
Saxon, taxation under, 125.
Norman, taxation under, 125, 126.
rights of over Crown lands, 133.
his orders must be authenticated by a minister, 17, 143.
'can do no wrong,' effect of maxim, 300–4.
King's Peace : *see* Peace.
Kowloon, 66 *n.*, 95.

L.

Labuan, 64.
Lagos, 64.
Lancaster :
Court of Common Pleas at, 264, 265.
Lancaster, Duchy of :
the private property of the King, 133, 134.
not merged in Crown lands, 134.
Land Tax, 114, 119, 120, 129.
Lands, Crown, 133–5.
surrendered by George III and his successors in return for Civil List, 135.

Lansdowne, Lord, 205.
Law Officers:
of Jersey, 52.
Lecky, Mr.:
on constitution of Irish Executive, 10.
Leeward Islands, 65 *n.*, 66, 67, 77.
Legatine powers, 220.
Legislation:
of self-governing colonies, 74–6.
of Canadian provinces, 73.
by Order in Council, for Channel Islands, 53, 56.
— for Crown colonies, 60, 61, 76.
— for Protectorates, 62, 76.
Legislative Council:
in colonies, 64, 65, 66, 67, 68, 71.
how constituted, 71.
payment of members of, 72.
Legislature:
of Isle of Man, 50.
of Channel Islands, 53, 57.
of Crown colonies, 66–8.
of self-governing colonies, 68, 71, 72, 74.
Letters Patent:
how granted, 18.
form of, 229.
office of Governor of Colony constituted by, 61, 71, 78, 309.
colonial constitutions framed by, 62, 70, 77.
Comptroller and Auditor-General appointed by, 151.
Army Council created by, 206.
for licence to alter or promulge canons, 228.
for appointment of Dean, 236.
for appointment of Suffragan Bishop, 249.
— of Indian Bishop, 249.
— of judges, 268.
— of Lord High Steward, 274.
under seal of diocese, 277.
under archiepiscopal seal, 280.
Indian Courts established by, 283.
Lord of Appeal appointed by, 292.
invalidity of, to create a new jurisdiction, 295.
Liberty, 234, 271.
Licence:
Establishment, 122.
Licence, Royal:
to alter and promulge canons, 228, 229.
necessity for, 230.
to elect a bishop, 249.
to consecrate, 249–50.
Lieutenant-Governor: *see* Governor.
Llewellyn:
Edward I annexes territories from, 2.
Local Authority, 29, 37, 38, 48.
Local Board, 41, 46, 47.
Local Government:
topics of, 29.
Rural, 30–9.
— its history, 30–1.
— the Parish Meeting, 32.
— the Parish Council, 32.
— District Council, 32, 33, 39.
— the Guardians of the Poor, 33.
— Sanitary Authority, 33.
— Highway Authority, 33.
— the Justices of the Peace, 34, 39.
Officers of County—
— the Sheriff, 34.
— the Lord Lieutenant, 35.
— the Custos Rotulorum, 35.
— the Coroner, 35.
— the administrative County, 32, 33, 36–9.
— the Standing Joint Committee, 39.
relation to central government, 29, 36.
Urban, 40–4.
— its history, 40.
— district, 41.
— municipal corporation, 41.
and the Central Executive, 44.
Local Government Acts, 33, 34, 36, 41, 46.
Local Government Board:
its duties, 14, 36.
increased powers of, 28.
certain County Council by-laws must be approved by, 37.
municipal corporation accounts laid before, 41.
consent of must be obtained to sale or mortgage of corporate property, 41.
its control of urban district as to by-laws, 8, 42.
as to accounts, 42.
of Scotland, 44.
of Ireland, 44.
duties and powers of Poor Law Board vested in, 45.
duties of Home Office and Privy Council as regards public health transferred to, 47.
increased powers of dealing with public health, 47.
means of control of local authorities, 48, 49.
model by-laws issued by, 48.

Lord Advocate:
for Scotland, 7.
Lord Chief Justice:
presides in Court of Criminal Appeal, 266.
and in King's Bench Division, 268.
Lord Justice Clerk, 281, 282.
Lord Justice General:
of Scotland, 282.
Lord Lieutenant:
of Ireland: *see* Ireland.
— his immunities, 81 *n.*, 302.
of County, 35.
— his duties, 35.
— how appointed, 35.
— his military duties, 169, 177, 178, 180.
— as President of County Association, 180.
— his duties as to Commission of Peace, 271.
— in practice the Custos Rotulorum, 35, 271.
Lord President:
of Scotch Court of Session, 281, 282.
Lords, House of, 26.
as a Court of Final Appeal, 284–6, 294.
— its composition, 291–2.
— its procedure, 293–4.
Admiralty appeals transferred to, 289.
Irish, 8, 9, 285, 286.
Lords Justices:
of Appeal, 260, 265, 268.
are members of Judicial Committee, 292.
Lords Spiritual, 218.
Loughborough, Lord:
on prerogative of Crown in cession of territory, 104.
Lower House:
titles of in various colonies, 71 *n.*
Lunacy:
Chancellor's jurisdiction in, 288.
Appeal to Privy Council in, 288.
Lunatic, Criminal, 25.

M.

Madras:
Governor of, 84, 86, 87, 89.
Magistrate:
Borough, 273.
Stipendiary, 273, 274.
Magna Charta, 115, 126.
Malta:
government of, 66.
Indian troops at, 173.
Man, Isle of:
Home Secretary's communications with, 19.
its constitution, 50–1.
appeals from Courts of, 51, 287.
Mandamus:
writ of, 48, 258, 265, 298, 302, 303, 304.
Manitoba, 72.
Mansfield, Lord:
in *Campbell* v. *Hall,* 77.
on right of military officer to resign his commission, 176.
Marcher Lordships:
organization of, 2.
jurisdiction of, 2, 3.
shire system introduced into, 3.
Marines, Royal, 173.
Martial Law, 170, 183, 186 *n.*
Mary I:
levied duties by proclamation, 117.
military legislation of, 169.
ecclesiastical legislation of, 222.
Master of the Rolls:
chief of Masters in Chancery, 259.
presides in Court of Appeal, 268.
proposed constitution of office in Newfoundland, 296.
Matneof, Andrew Artemonowitz, 100.
Mauritius, 66.
Mercy, prerogative of:
used on advice of ministers, 19.
nature of, 26, 27, 298.
when vested in Colonial Governor, 70, 71, 79.
unaffected by Criminal Appeal Act, 267.
Metropolitan:
the Pope as, 219.
the Archbishop as, 225, 235.
of South Africa, 248.
Military law:
persons subject to, 185–9.
distinguished from martial law, 186 *n.*
administration of, 185–8, 275.
Military tenures:
a source of revenue, 119, 125.
their abolition, 119, 168, 170.
Militia, 177.
history of, 177–9.
ballot for, suspended since 1829, 178.
taken from control of Home Secretary, 178.
liabilities of, as an auxiliary force, 179.

Militia:
under Territorial and Reserve Forces Act, 179, 180.
Militia Act (1882), 35, 178.
Ministers:
of a self-governing colony, 68–73.
Minutes:
Cabinet, 216.
Misprision of Treason, 274.
Moderator:
of General Assembly, 242.
Money, Public:
how collected, 136, 137, 150.
how issued, 134, 137, 144, 150, 151, 152, 154, 155, 157–8, 316–22.
how accounted for, 156–8.
Committee on, 149.
Monition:
sentence of Ecclesiastical Court, 237.
Municipal Corporation, 36.
constitution of, 41.
its functions, 41, 48.
Municipal Corporations Acts, 37 and *n.*, 40, 41, 45, 46.
Mutiny Act, 9, 172, 173, 178, 181, 182, 189, 196.

N.

Natal:
Government of, 69, 70, 71.
In re the Bishop of, 248.
National Debt, 136.
interest on, how paid, 152 and *n.*
National levy:
its liabilities, 167, 168.
how affected by repeal of Statutes of Armour, 169.
Naturalization, 19.
Naturalization Act, 20.
Naval Discipline Act, 176, 185, 186, 189.
Navy:
expenditure on, 148, 157.
estimates for, 152, 153, 154, 215.
how manned and disciplined, 183–5.
terms of service, 183.
officer of, 176, 184.
liabilities of sailor, 185.
Paymaster of, 148, 161.
Treasurer of, 161.
'Controller of,' 212.
New Brunswick, 72.
Newfoundland, 69, 71.
question of creation of a court of equitable jurisdiction in, 296.
New Hebrides, 64.
New South Wales, 69, 71.
New Zealand, 69, 71, 79.
Nigeria, Northern:
High Commissioner for, 65.
Nigeria, Southern, 64, 66.
Nisi Prius:
trial of issues at, 262.
Norman:
kings, taxation under, 125.
— their rights over Crown lands, 133.
— Exchequer of, 139.
Normandy, Duke of:
the Channel Islands held by, 52.
North, Lord, 103.
Nottingham, Lord:
Lord Chancellor, 256.
Nova Custuma, the, 115.
Nova Scotia, 68 *n.*, 71, 72.
Nyassaland Protectorate, 66.

O.

Oath:
judicial, 268.
Octennial Act, the, 9.
Office, tenure of:
at pleasure, 304.
during good behaviour, 85, 151, 268, 292.
Officer:
naval or military, conditions of service, 176, 177, 184.
Official Principal:
of Bishop or Archbishop, 277, 279, 280.
Ontario, 72.
Orange River Colony, 68, 69, 71, 105, 108.
Order:
royal, for expenditure on supply services, 137, 155, 316.
Order in Council:
for giving effect to Extradition Acts, 21.
for constituting Local Board, 46.
for revoking Local Government Board orders, 48.
for legislation for Channel Islands, 54, 55 and *n.*, 56.
for the colonies, 60, 61, 62, 65 and *n.*, 67, 70, 76.
for protectorates, 62, 63, 76, 92, 93, 94.
restrictions on right of Crown to legislate by, 76.
for sphere of influence, 94.
for cession of territory, 105.
for embodiment of Militia, 179.
for summons of Convocation, 225.
for distribution of business in War Office, 200, 202, 211.
— in Admiralty, 212.

Order in Council:
Common Pleas and Exchequer Divisions merged in Queen's Bench by, 267.
circuits altered by, 269.
for rules of procedure of Supreme Court, 269.
and Judicial Committee, 289.
for giving effect to advice of Judicial Committee, 293.
Orders, Clerical:
conferred by bishop, 235, 236.
effect of, on *status*, 237.
Orders from India Office:
secret and urgent, 85.
Ordnance:
Paymaster of, 148, 161.
Ordnance Board, 214.
Master-General of, 189-90, 191, 207.
history and duties of, 191-2.
its survey of United Kingdom, 192.
Surveyor-General of, 200, 202.
Inspector-General of, 204, 205.
Ordonnance, 56.
Overtures:
of Scotch General Assembly, 243.
Oyer and Terminer:
Commission of, 266.

P.

Palmerston, Lord:
his appeal to country in 1857, 103.
as Secretary at War, 194, 195, 303.
Pardon:
not pleadable to impeachment, 27.
— nor to civil wrong, 27.
duty of Home Secretary as to, 27.
Governor of colony exercises prerogative of, 70, 71.
Parish, 31, 32, 42.
meeting of, 32.
council of, 32.
an ecclesiastical unit, 31, 233.
Parlement Belge:
case of the, 100, 109, 110.
Parliament:
Scotch, 4, 5, 135.
Irish, 7-10, 12, 136.
Canadian, 69, 73, 74, 75.
Australian, 73, 74, 75.
of United Kingdom, 13.
— can legislate for colonies, 60, 77.
supremacy of, 78.
disputed in Channel Islands, 34.
Parliament:
office-holders removable on address of, 85, 268, 292.
its control in Indian affairs, 86.
in making war and peace, 103.
in cession of territory, 103-8.
in treaty-making, 109.
asserts control over customs duties, 116, 117.
acquires control over expenditure of public money, 134.
appropriates supply, 143.
considers estimates of public departments, 153, 154.
its objections to standing army, 170, 171, 185, 190.
not felt as to navy, 183, 185.
must be assembled if Reserves are called out, 180.
responsibility of ministers to, 98, 209, 212.
the Long, 117, 169, 178, 184, 286.
Parliamentary Secretary of Poor Law Board, 45.
Patent: *see* **Letters Patent.**
Paymaster-General, 137, 148, 151-2.
his supply account, 155.
in dealing with spending departments, 155, 158, 160.
Paymaster of Forces, 161, 194.
Pay Office, 162.
Peace:
prerogative of making, 102-3
Peace:
the Folk's, 252.
the King's, 36, 252.
maintenance of, 16, 19-28.
commission of, 34, 271, 274.
justice of, 34, 271-4.
Peckham, Archbishop, 228.
Peculiar, 233-4, 271, 280.
Peel, Sir Robert:
his financial policy, 119, 130.
Peer:
mode of creation, 17-18.
Pells:
Clerk of, 141, 144, 148.
Perceval, Mr. Spencer:
Teller of Exchequer, 141.
Perim:
Island of, 89.
Petition of Right:
lodged with Home Secretary, 19.
procedure in, 299.
extent of remedy, 299, 300, 304.
Petition of Right, The: 127, 170.
Phillimore, Sir R.:
in the *Parlement Belge* case, 110.
Pipe Office, 135.

Pitt, William:
and Union of Ireland, 12.
and consolidation of customs, 118.
makes land tax perpetual, 129.
income and property tax first imposed by, 130.
Plantations, Board of, 58, 59.
appeals from, 287.
Pleas of the Crown, 52, 253.
Police:
County, 22.
Borough, 23.
City of London, 23.
Metropolitan, 23.
Poll-tax, 128.
Poor Law:
administered by local authorities, 29.
— by Board of Guardians, 42.
the Poor Law Board, 45, 47.
its history, 45.
how Justice of Peace is concerned with, 271.
Poor Law Amendment Act (1834), 33, 45.
Poor Law Union, 32, 33.
Postmaster:
early duties of, 131.
Postmaster-General:
first appointment of, 131.
his privileges, 132.
Post-Office:
rights in, of Home Secretary, 20.
of Lord Lieutenant of Ireland, 20.
a branch of Inland Revenue, 114, 124, 131, 132.
history of, 131.
growth of, 132.
revenue collected by, 137.
Poundage, 128.
on imported goods, 116–18.
Poyning's Law, 7, 8.
Praemunire:
penalties of, 223.
Prerogative Court:
of Archbishops, 280.
Prerogative, Royal:
in relation to Irish Parliament, 8.
of mercy, 19, 26, 27, 55, 266, 267, 298.
at Common Law, 35.
in respect of the Colonies, 59, 61, 79.
of protectorates, 63.
in India, 84.
in making war, 102.
in making peace, 103.
in making treaties, 103.
in cession of territory, 103–8.
Prerogative, Royal:
in military discipline, 175.
as to government of army, 182, 190, 209.
as to government of navy, 184.
in relation to Colonial Church, 247.
in appointment of bishops, 247–50.
as to appeals, 288–90.
can only be taken away by express words in a statute, 297.
Presbytery:
of Scotch Church, 241, 242, 243.
Priest, 234.
Prime Minister, 88, 98, 153, 205, 215.
Prince Edward Island, 72.
Prisage:
part of hereditary revenues of Crown, 115, 116.
Privy Council, 41, 42, 46, 47, 55.
as a Court of Appeal, 288.
Judicial Committee of, 58, 74, 106, 110, 224, 243, 275, 284, 293, 295.
— its jurisdiction, 288–90.
— its composition, 291–2.
Committee of, for Colonies, 58, 59.
— for Channel Islands, 55.
all members of on Commission of Peace, 271.
unanimity in, 293–4.
Privy Council:
Irish, 8.
Privy Seal: *see* **Seal.**
Proclamation:
of Indian Government, 86.
Proctor:
summons of, to Convocation, 226, 227.
Prohibition:
writ of, 187, 257, 265, 275.
Prolocutor:
of Lower House of Convocation, 227, 230.
Property:
how taxed, 122, 124–30.
public, of foreign states, 100.
Property and Income Tax:
revenue from, 114.
first imposed by William Pitt, 130.
Protectorate:
definition of, 59.
distinguished from a colony, 60.
mode of origin of, 63, 90, 91, 92.
common features of colony and, 64.
distinguished from sphere of influence, 90.

Protectorate:
where no state exists, 92.
— jurisdiction over, 92–3.
provision for administration of justice in, 297.
Province:
Dean of, 226.
convocations of, 227, 229.
dioceses in each, 227, 233.
courts in, 279–80.
Public Accounts:
Committee of, 138, 149, 157, 158, 162.
Commissioners of, 161.
Public Health:
Acts relating to, 33, 41, 42, 46, 47.
Board of, 46.
Public Worship Act (1874), 279, 280.
Puisne judges, 259.
Purveyance, 170 *n.*

Q.

Quarter Sessions:
in boroughs, 24, 43.
in counties, 39.
administrative duties of, 43.
criminal jurisdiction of, 271, 272, 273.
Quartermaster-General, 204, 205, 207.
Quebec, 68 *n.*, 71, 72.
Queen:
regnant, 235.
consort, 235.
Queensland:
government of, 69, 71.
Quo Warranto:
writ of, 258.

R.

Rates, Book of, 117, 119.
Recorder, 24, 273.
Rector, 234.
Reformatory:
under control of Home Office, 25.
Regency Bill, 145, 146.
Registration Act (1885), 37 and *n.*
Renunciation, Act of, 9, 286.
Reserve Forces, 177.
under Act of 1882, 177, 179, 180.
Responsible government:
meaning of, 68.
in colonies, 69–75.
Revenue:
sources of, 113, 114.
Revenue:
paid into Consolidated Fund, 118, 120, 137, 150.
collection and expenditure of, 119, 136–66, 150.
hereditary, of Crown, 120, 125, 133 and *n.*
of Scotland and Ireland, administration of transferred to English Treasury, 135, 136.
of India not to be used for military operations beyond frontier, 174.
Rhodesia, 63 *n.*
Richard II:
Admiralty Court in reign of, 257.
Rights, Declaration of, 171.
Rome, Church of:
breach with, 222.
Royal Court:
of Jersey and Guernsey, 53, 55, 56.
Royal Niger Company:
rights and powers of transferred to Crown, 63.
Rules Publication Act (1893), 269.
Rural Dean, 233, 234, 278.
his duties, 236.

S.

Saladin tithe, 126.
Sanitary Authority:
urban, 42, 47.
districts, rural and urban, 33, 41.
Sarawak, 60 *n.*, 91, 92.
Sark, 58.
Saskatchewan, 72.
Saxon:
township, 30; hundred, 30; shiremoot, 30, 33; courts, 30, 253; *burh*, 40; *fyrd*, 168; Church, 219.
kings, taxes under, 125.
— their rights over land, 133.
Scotland:
Union with, 4–7, 135, 136.
succession to Crown of, 5.
representation of in Parliament, 6.
Secretary of State for, 6, 7, 28, 44.
Courts of, 7, 135, 281–2.
appeals from, 282.
hereditary revenues of Crown in, 135, 164.
Exchequer of, 135.
Treasurer of, 135.
Great Chamberlain of, 135.
taxation of uniform with England, 136.
security of Church in, 241.

Scutage:
a commutation for military service, 125, 126, 127, 168.
Seal:
Great: *see* **Letters Patent.**
illustrations of its use, 17, 18.
for pardon, 27.
for commission, 224.
for writs, 227.
for licence in ecclesiastical matters, 229.
for appointment of judge, 268, of Lord High Steward, 274.
of Ireland, 8.
Privy:
payments from Exchequer under, 139, 143, 144, 145.
Secretary:
Principal, of State: *see* **Home Office, Foreign Office, Colonial Office, India Office, War Office.**
meaning of term, 15.
his especial duties, 16, 18.
for Northern and Southern Departments, 58.
increase of numbers, 58, 59, 194, 198.
for Foreign Affairs, 97.
The King's:
for Scotland: *see* **Scotland.**
for Ireland: *see* **Ireland.**
Financial, for army, 200, 202, 207, 208.
for Admiralty, 212.
Security, Act of, 5.
Session:
Court of, 6, 7, 281, 282.
Sessions:
Great, of Wales, 4.
Quarter, 24, 39, 271, 272, 273.
Petty, 39, 272.
Settlement, Act of, 26, 297.
Seychelles, the, 66.
Sheading:
an electoral division in Isle of Man, 51 and *n.*
Sheriff:
duties of, 35, 169.
under Norman kings, 125, 219–20.
as collector of revenue, 138.
how appointed, 35.
of Scotland, how appointed, 282.
Shire:
officers of, 30.
taxation of, 127.
Shiremoot, 30, 33, 219.
Sierra Leone, 65, 66.
Sign Manual:
order under for issue of public money, 155.
Sign Manual:
licence under for appointment of Colonial Bishop, 249.
Warrant under, for transfer of judge, 268.
Signet:
Commissions under, 305, 306, 312.
Instructions under, 313.
instances of its use, 249, 305, 306, 312, 313.
Small Holdings Act (1907), 38.
Socotra, Island of, 89.
Somaliland, 65.
Sombrero, Island of, 90.
Soudan:
government of, 95, 96.
Special Reserve, the, 179, 180, 181.
Sphere of Influence:
nature of, 90, 94.
Anglo-German agreement concerning, 94.
St. Helena, 65.
St. Lucia, 66.
St. Vincent, 66.
surrender of its constitution, 62.
Staff, Chief of, 203, 206, 207.
Stamp Acts, 123, 124, 136.
Stamps:
a source of revenue, 114, 122–4.
stamp duties distinct from death duties, 123.
— extended to Scotland after Union, 136.
Standing Army: *see* **Army.**
Standing Joint Committee:
its duties, 39.
Stannaries:
Court of the Lord Warden of, 267.
Staples:
Statute of, 115.
Star Chamber:
Court of, dissolved by Long Parliament, 286.
States, the:
in Jersey and Guernsey, 53–5, 56, 57.
Statutum Walliae:
shire organization introduced by in Wales, 2, 3.
Steward, Lord High:
Court of, 274.
Stipendiary Magistrates, 24, 273, 274.
Straits Settlements:
protectorate over, 61, 63, 64, 66, 91, 92.
Submission of Clergy:
Act for the, 223, 228.
effect of, 224.
legislative rights of Church defined by, 230.

Subpoena :
writ of, 256.
Subsidy :
of tunnage and poundage, 116.
the New, 118.
a tax on property, 127.
takes place of tenth and fifteenth, 127.
its meaning in sixteenth and seventeenth centuries, 128.
Suez Canal :
Shares in, a source of revenue, 114.
Suffragan bishop, 236, 249.
Supply :
Committee of, 151, 154, 173.
Services, 151, 152–5, 156, 162, 316–19, 321.
Supremacy, Act of, 222.
Supreme Court : *see* **Court.**
Suspension :
an ecclesiastical punishment, 237.
Swaziland, 65.
Synod :
of English Church, 227.
of Scotch Church, 242.

T.

Tallage, 127.
Tally :
Exchequer, 139, 140 and *n.*
of *Sol* and of *Pro,* 140.
Tasmania, 69.
Tax :
forms of, 124–30.
on land, 129.
Teinds :
Court of, 6, 7, 281.
Telegraph :
use of by Home Secretary, 20.
a source of revenue, 114, 132.
definition of, 132 *n.*
Teller of Exchequer :
money kept in office of, 138.
duties of, 140, 141, 144.
emoluments of, 141, 161.
the office abolished, 142.
Territorial and Reserve Forces Act, 177.
forces under, how composed, 172, 177, 180.
how organized, 180, 181.
Territorial Waters Jurisdiction Act, 22.
Testamentary causes, 276, 280.
Thurlow, Lord :
on prerogative of Crown in cession of territory, 104.
Tithe, 238, 276, 277.
Tobago, 66.
surrenders its constitution, 62.
united in government with Trinidad, 62.
Town :
how constituted, 40.
meaning of term, 43.
Council, 46, 47.
taxation of, 126.
Trade, Board of :
its connexion with public health, 47.
its relation to the Colonies, 58, 90.
formerly Committee for Trade and Foreign Plantations, 59.
President of, 59.
Transvaal, 68, 69, 71.
Treasurer, 139, 146, 149.
of Scotland, 135.
office of in England and Ireland united, 136.
his duties, 139, 142, 146.
his clerical staff, 139, 140, 141.
his withdrawal from Exchequer business, 143.
Treasurer of the Navy, 161.
Treasury :
First Lord of, 83, 145, 195.
Lords Commissioners of, their duties as to issue of public money, 137, 145, 155, 317, 318, 320.
warrant, 144, 145.
Board, 144, 145, 160, 161.
financial year of, 149.
minutes, 157.
Chest Fund, 158–9.
control over estimates, 151, 153, 208.
over expenditure, 153, 160–2.
army commissariat once a department of, 190, 191.
Treaty :
prerogative respecting, 103.
when needing parliamentary assent, 103, 104, 106–9.
Trinidad, 66.
Tristan d'Acunha, 90.
Tudor queens :
impose duties on imports, 117.
Tunnage, 128.
on imported goods, 116–18.
Turk's Island, 66.
Tynwald :
Court of, 50.

U.

Uganda, 65.
Union :
with Scotland, 5, 135.

Union:
with Scotland, its terms, 5, 241.
with Ireland, 12, 245.
United Free Church, Scotch: *see* **Free Church.**
United Kingdom:
its component parts, 1, 5, 12.
central government of, 14.
Urban District, 41–3.
Urban Sanitary Authority, 41–4.
Uses, Statute of, 256.

V.

Veto:
on legislation of Irish Parliament, 11.
on legislation of Colonial Parliament, 60, 75, 76.
of Governor-General of India, 88.
Vicar, 234.
Vicar-General, 51, 277, 278, 280.
Vice-Chancellor:
Court of, 259.
Viceroy, of India: *see* **Governor-General.**
Victoria:
colony of, 69, 71.
provision in statute for public appointments, 69.
Victoria, Queen, 61, 94, 106, 109, 229, 267.
Visconte:
in Jersey, 53.
Visitor:
powers of, 235.
Volunteers, the, 177, 181.
nature of force, 179.
liabilities of, 180.

W.

Wales, Prince of (and Princess):
provision made for out of Consolidated Fund, 165.
Wales, Principality of:
its relation to England, 2–4.
Henry VIII's legislation for, 3.
shire system introduced into, 3.
representation of counties of, 3.
Courts of, 4.
Walpole, Sir Robert:
Excise Bill of, 121.
War:
Office, distribution of duties in, 199, 200, 202.
— dual control of army, with Horse Guards, 194.
— Financial Secretary of, 200, 202, 203, 208.
War:
Secretary of State for, 59, 83, 153, 178, 181, 189, 192, 194, 197–211, 303.
— his duties, 189, 196, 197, 201, 209, 210, 214.
— his staff and advisers, 198, 199, 202–208.
— his relations with Parliament, 196, 198, 201, 208; and with the army, 191, 192, 196, 197, 208, 210.
— how appointed, 201.
Articles of, 171, 181, 182, 188.
Secretary at, 189–94, 196, 197, 304.
— his duties, 193–4.
War Office Council, 206, 323.
War Office Reconstitution Committee, 206, 216.
Warrant:
Royal, 157, 303.
Treasury, 144, 145.
Watch Committee, 43.
Ways and Means:
Committee of, 154.
Act, 154, 158.
Weihaiwei, 65, 95.
Western Pacific Islands:
High Commissioner for, 64, 65, 66.
protectorate of, 92.
Westminster, Courts at:
Welsh shires not subject to, 2.
— except Monmouth, 3.
— until 1830, 4.
Whitehall:
Treasury at, 135.
William I:
taxation under, 125.
his legislation and rules as to Church, 219–20.
William III, 192.
new import duties imposed under, 118.
income of Crown lands in reign of, 134.
civil list of, 134, 163.
Winchester:
Statute of, 168.
Windward Islands, 62, 66.
Witan, 133, 219.
Wolseley, Lord, 205.
Women's franchise:
in colonies, 72 *n.*
Woods and Forests, Commissioner of: *see* **Commissioner.**
Wool:
export duty on, 116, 118.
Writ:
of Prohibition, 187, 237, 265, 275.
of Certiorari, 187, 265, 275.

Writ :
of Habeas Corpus, 187, 237, 275.
the King's, 224.
of summons to Archbishop, 225.
of Subpoena, 256.
of Mandamus, 258, 265, 298, 302, 303, 304.
of Quo Warranto, 258.

Y.

Yeomanry, 177, 181.
nature of force, 179.
liabilities of, 180.

York :
province of, 226, 227, 236.
— Courts of, 280.
representation of parochial clergy in province of, 227.
Convocation of, 227, 229, 232.
archiepiscopal diocese of, 233.
Yorke, Mr. Charles :
Teller of Exchequer, 141.

Z.

Zanzibar :
protectorate over, 63, 91.

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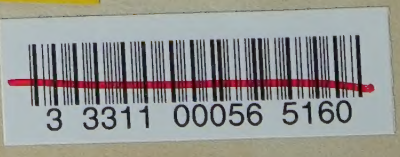

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